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CASES

ARGUED AND DETERMINED

IN

The Court of Common Pleas.

VOL. V.

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CASES

ARGUED AND DETERMINED

IN

The Court of Common Pleas,

WITH TABLES OF THE NAMES OF THE CASES ARGUED AND CITED, AND OF THE PRINCIPAL MATTERS.

By JAMES MANNING,
SERJEANT AT LAW,
AND
T. C. GRANGER,
OF THE INNER TEMPLE, ESQUIRE, BARRISTER AT LAW.

VOL. V.

FROM HILARY TERM, 1843, TO EASTER TERM, 1843.
BOTH INCLUSIVE.
WITH THE REGISTRATION APPEAL CASES OF MICHAELMAS TERM, 1843, AND HILARY TERM, 1844.

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CASES

1843.

UPON APPEAL FROM THE DECISIONS OF REVISING BARRISTERS,

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS(a),

IN

Michaelmas Term and Vacation,

AND

Easter Term,

IN THE

SEVENTH YEAR OF THE REIGN OF VICTORIA. (b)

West Riding of YORKSHIRE.

AUTEY, Appellant; TOPHAM, Respondent. *Nov.* 7.

SHEE Serjt. applied, on behalf of the appellant, that the appeal in this case might be entered by one of the masters, under sect. 62. of the registration act. (c) By

Where the statement of the case by the revising barrister and the notice of intention to prosecute the appeal have not been sent to the masters within the four first days of *Michaelmas* term, the court will not, except under peculiar circumstances, allow the appeal to be entered.

(a) Under the provisions of the registration act, 6 & 7 *Vict.* c. 18.

(b) These cases are reported in this place in order to render them available at the next revision of the lists of voters.

(c) Enacting, "That every appellant who shall intend to prosecute his appeal shall, within the first four days in the *Michaelmas* term next after the decision to which such appeal shall relate, transmit to the masters of the said court of Common Pleas the statement

1843.

AUTEY, App.
TOPHAM, Resp.

that section, the appellant was required within the four first days of *Michaelmas* term, to transmit to the masters the case, as stated by the revising barrister, together with a notice to prosecute the appeal.

The affidavits stated that the case and notice had only arrived from *Leeds* by that day's post, and that the delay had been merely accidental. [*Tindal* C. J. referred to sect. 64. of the act. (*a*)] The learned serjeant submitted that the statute had been virtually complied with. The appellant is not required to *enter* the case within the four first days of the term, but merely to *transmit* it to the masters. The statement was, in fact, *transmitted* by yesterday's post.

Dowling Serjt., for the respondent, was willing to consent that the appeal should be received and entered.

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in writing so signed by the said revising barrister as aforesaid, and shall also therewith give or send a notice, signed by him, stating therein his intention to prosecute the said appeal; and the said appellant shall also give or send a notice, signed by him, to the respondent in the said appeal, stating his said intention duly to prosecute such appeal in the said court; and one of the masters of the said court, to be nominated for that purpose by the Lord Chief Justice of the said court, shall forthwith enter every appeal of which he shall have received due notice from the appellant as aforesaid, in a book to be kept by him for that purpose."

(*a*) By sect. 64. it is enacted, "That no appeal or matter of appeal whatsoever shall in any case, except where the conduct and direction of the appeal, or of the answer thereto, shall have been given by order of the court of Common Pleas, or of any judge thereof, to any person, be entertained or heard by the said court, unless notice shall have been given by the appellant to the masters of the said court at the time and in the manner hereinbefore mentioned; and no appeal shall be heard by the said court in any case where the said respondent shall not appear, unless the said appellant shall prove that due notice of his intention to prosecute such appeal was given or sent to the said respondent ten days at least before the day appointed for the hearing of such appeal: provided always, that if it shall appear to the said court that there has not been reasonable time to give or send such notice in any case, it shall be lawful for the said court to postpone the hearing of the appeal in such case, as to the said court shall seem meet."

1843.

AUTEY, App. TOPHAM, Resp.

The words of the act are directory, and not compulsory. In the case of *Simpson*, appellant, and *Wilkinson*, respondent, the court yesterday — the fourth day of the term, — granted leave to extend the time for sending the notice to the masters under the sixty-second section, upon an affidavit of the clerk to the agents of the appellant, that the case had been received by that morning's post, but that the notice of prosecution did not accompany the case; and that, as the appellant resided at *Peterborough*, in *Northamptonshire*, his signature to the notice could not be obtained in time to file the appeal and give the notice within the time specified.

TINDAL C. J. The sixty-second section of the act requires the case to be transmitted, together with notice of intention to prosecute the appeal, within the first four days of the term. The sixty-fourth section expressly provides that no appeal shall be heard unless the requisite notice has been given. The notice not having been given in this case, the court has no authority to order the appeal to be entered. Possibly a case may arise, where in consequence of circumstances of an inevitable nature having occurred, the court would think it right to interfere; but none such are suggested here. In the case referred to of *Simpson*, appellant, and *Wilkinson*, respondent, the sixty-fourth section was not brought before the notice of the court. We shall probably have to review that decision. (*a*)

(*a*) Northern Division of the County of NORTHAMPTON.

Simpson, appellant; *Wilkinson*, respondent. — After the decision in the principal case, the master intimated that this case would be struck out of the list of appeals,

The statement in writing by the revising barrister is duly transmitted to the masters, but the notice of intention to prosecute the appeal is not sent in time: Held, that the appeal cannot be entered.

An affidavit by the clerk of the attorney to the appellant, stating that the notice which is required to be signed by the appellant, had by mistake not been sent, cannot be received as a substitute for such notice.

1843.

AUTEY, App.
TOPHAM, Resp.

It is said that the words of the act are only directory; and if the case stood on the sixty-second section alone, possibly we might so have held; but the words of the sixty-fourth section are not to be got over.

As to the consent on the part of the respondent, that the appeal may now be entered, the court cannot attend to that. The question is, whether we have any jurisdiction to entertain the case. The jurisdiction is a new one conferred by the legislature; and the more wholesome course will be, not to extend that jurisdiction, even with the consent of parties; otherwise we might be called upon in the next, or some future term, to

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Whereupon *Byles* Serjt. for the appellant, prayed the court that the appeal might be retained on the list. He distinguished it from the principal case, inasmuch as the *statement* had been sent within the first four days of term, although the notice had not accompanied it; whereas in the principal case neither had been sent. He submitted, that by the sixty-fourth section a power was reserved to the court to make an order as to the conduct and direction of the appeal. And that by the proviso at the end of that section, the court might postpone the hearing of the appeal where there had not been reasonable time to give or send the requisite notice. The notice was not required by the sixty-second section to be under the hand of the appellant. It was required to be signed by him. A signature by an agent would be sufficient. And the affidavit upon which the application had been made might be treated as a notice signed by the agent of the appellant.

TINDAL C. J. The proviso at the end of the sixty-fourth section clearly refers to the notice therein last mentioned, which is the notice to the respondent, required to be given ten days before the day appointed for the hearing. The notice to the master is like the delivery of a writ of error with the transcript of the record to the clerk of the court, which is necessary in order to give jurisdiction to the court of error. An affidavit by an attorney's clerk, that the notice had not arrived, can hardly be treated as a substitute for the notice itself.

MAULE J. The exception in the sixty-fourth section, as to the conduct and direction of appeals, applies to appeals consolidated under the forty-fifth section.

The other judges concurring, the case was struck out of the list of appeals.

entertain a case which ought to have been entered in this term.

1843.

The other judges concurring, the application was

Refused.

AUTHY, App.
TOPHAM, Resp.

City of BRISTOL.

TUDBALL, Appellant; The Town-Clerk of BRISTOL, Respondent.

Nov. 20.

WILLIAM TUDBALL objected to the name of *John Jenkins* being retained in the list of the freemen entitled to vote in the election of members for the city of *Bristol*.

Notice of objection was proved to have been duly served; which notice, was signed "*William Tudball*, of *Hotwell Road*, on the list of voters for the parish of *Clifton*."

The name of *William Tudball* was not upon either the householders' or freeholders' list of voters for the parish of *Clifton*, but his name was upon the alphabetical "list of the freemen of the city of *Bristol*," and there, under the letter *T.*, he and several others were consecutively stated as "all of the parish of *Clifton*." (*a*)

It was objected, on behalf of the said *John Jenkins*, that *William Tudball*, instead of stating himself in the notice, to be on the list of voters for the parish of *Clifton*, ought to have stated himself to be on the list of freemen of the city of *Bristol*; and we, being of that opinion, decided that the notice was insufficient, and did not require the said *John Jenkins* to prove his qualification, but retained his name upon the said list.

(Signed) *J. T—*, *G. G. K—*, } Revising barristers.

A notice of objection was served by a party, whose name was on the list of freemen, and who in that list was described as "of the parish of *C.*" In the notice the objector was described as "of *H. Road*, on the list of voters for the parish of *C.*" Held, that this notice (although it strictly followed the form given in 6 & 7 *Vict.* c. 18. sched. B. No. 11.) was inaccurate, such form being applicable only to parties on the list of household voters.

(*a*) The list of freemen was sent with the statement of the revising barristers, as forming part thereof.

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The case then stated that the revising barristers had come to the same decision upon similar notices served upon seven persons in the list of freemen, and upon forty-five persons in the lists of various parishes; and that the barristers ordered all these cases to be consolidated and that the town-clerk of the city of *Bristol* should be the respondent. The case then proceeded thus: —

Should the court of Common Pleas be of opinion that the notices in these several cases were insufficient, then the names of the several persons so objected to will remain upon the register; but if the court be of a contrary opinion, their names should be expunged therefrom.

(Signed as above.)

The case further stated, that as there was no person who engaged for the respondents to appear and answer the appeal, the names of such respondents would in such case (*sic*) have been written under such engagement, with true particulars of their qualification set forth; the barristers annexed two other lists, wherein were accurately set forth the qualifications opposite to each name, to enable the master of the Common Pleas to give distinct and accurate instructions as to any alterations or corrections that the court might direct to be made.

(Signed as above.)

Cockburn for the appellant. The question in this case turns upon the construction of the 17th section of the registration act, and of the schedule therein referred to. By that section it is enacted that any person whose name is inserted in any list of voters for a borough, may object to any other person as not being entitled to appear in that list; and it requires that notice of the objection shall be given to the overseers, or to the town-clerk, being the parties who respectively make out the lists of householders and freemen. This notice is to be in the

form numbered (10.) in schedule B, *or to the like effect;* it is further required that notice of the objection should be given to the party objected to, according to the form numbered (11.) in the schedule above referred to.

The 14th section enacts, that the town-clerk shall make out and publish a list of freemen of the city or borough entitled to vote according to the form numbered (5.) in the above schedule, together with their places of abode.

In this case the name of the objector was published in the list of freemen, he being therein described as "of the parish of *Clifton.*" According to the form of the notice given in schedule B, No. (11.) it is required to be signed "*A. B.* of (*place of abode*) on the list of voters for the parish of ——." This form is not strictly applicable to the case of a freeman, as the name of a freeman would appear in the list of freemen for the whole city, and not in the list of voters for any particular parish; but it is to be observed, that in every other case where a notice is required by the act, and the form of such notice is given in the schedule, the words "or to the like effect" are introduced. These words occur in the 17th section with reference to the notice required to be given to the overseers or the town-clerk; but they do not appear in the latter part of the section which relates to the notice required to be given to the party objected to. The form given in the schedule B, No. (11.) has been strictly adhered to; and it would appear that from the circumstance of the qualifying words "or to the like effect" being omitted, the legislature intended that the precise form given should be adopted. [*Maule* J. It is required by the 14th section that the places of abode of the freemen shall be given. But a freeman entitled to vote may reside within seven miles of the city or borough; so that resi-

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dence within any parish of such city or borough is not necessary (*a*).] The place of residence of the objector must be stated in the notice of objection; and that has been done in this case; the same strictness is not required in these notices as in pleadings, and if any thing unnecessary has been stated, it may be rejected as surplusage; the residence might have been omitted, but the notice will not be vitiated by its insertion, the legislature clearly intended that the party objected to should have the means of identifying the objector. [*Maule* J. The legislature probably intended that the party objected to should have an opportunity of knowing whether the objector was on the list of voters. The words in question in this notice apply to parties whose names are inserted in the parish lists; the notice therefore cannot be read as though the words were not there. The notice in fact refers the party objected to to the list of parish voters. To this he would look if he wished to ascertain who the objector was; but he would not find the name there, and might therefore be misled.] At most the objector has only made a statement in his notice which it was not necessary for him to make; but he has not lost his right to object, by having done so.

Austin, for the respondent, was stopped by the court.

TINDAL C. J. I think that the objecting party has been misdescribed. The form given in the schedule B (No. 11.) has been followed more closely than was necessary, whereby the party objected to would either be misled, or there would be thrown upon him greater inconvenience in examining the different lists than the act of parliament contemplated. I think the notice of

(*a*) See 2 *W.* 4. *c.* 45. *s.* 32.

objection was bad, and therefore that the party objected to was not called upon to prove his right to vote.

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Per curiam;

Decision affirmed.

Borough of WENLOCK.

THOMAS CHARLTON WHITMORE, Appellant; WILLIAM BEDFORD, Respondent.

Nov. 20.

IN a list of persons entitled to vote in the election of members for the borough of *Wenlock*, in respect of property situate within the said borough, on the 31st day of *July* 1843, appears the following entry, namely,

Name.	Place of Abode.	Nature of Qualification.	Where situate.
Thomas Charlton Whitmore.	Beckbury Brook.	Building and land.	Beckbury Brook.

The said *Thomas Charlton Whitmore* having been duly objected to by *William Hedford*, appeared in support of his vote, and proved that he was in all other respects a duly qualified voter for the said borough; the only question was, whether the building for which he claimed to vote, was sufficient, within the statute.

The building, to which the objection applied, consisted of a cow-house or stable, substantially built of stone, the roof of which was tiled, having a door with a lock and key. It was proved also, that the building was substantial and suitable for the purpose for which it was

A cow-house or stable is a "building" within the 2 *W.* 4. *c.* 45. *s.* 27. the occupation of which will confer the franchise for a borough.

No order for altering the register pursuant to the decision of the court need be drawn up.

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erected and used, and conveniently placed for the occupation of the claimant's land.

The case then stated that, after hearing arguments on both sides, the revising barrister decided that the building was not one to which the words "other building" in 2 *W.* 4, *c.* 45. *s.* 27. would apply, and expunged the name of the voter; which was to be restored if the court of Common Pleas were of opinion that the building was such as entitled the claimant to vote.

The case of another party claiming to vote in respect of the occupation of a stable and land within the said borough was consolidated with the above case.

(Signed) *T. G. P*—, Revising Barrister.

Austin, for the appellant, was stopped by the court.

Manning Serjt., for the respondent. The question here is whether the "building" mentioned in the case is within the meaning of the first part of the 27th section of the reform act (*a*) which confers the right of voting in cities and boroughs on the occupier of "any house, warehouse, counting-house, shop or other building, being &c., of the value of not less than 10*l.* per annum." If the court confirm the opinion of the revising barrister that the building in question is not of the nature described by the act, the appellant will not be disfranchised, as he will still be entitled to vote for the county, if the building should be considered as auxiliary to the land occupied by the party; but he will not be entitled to vote for the borough.

The "other building," contemplated by the 27th section, must be *ejusdem generis* with those that are previously mentioned. The rule for construing all statutes, as laid down by the court in *Sandiman* v.

(*a*) 2 *W.* 4. *c.* 45.

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Breach (*a*), is, that where particular words are followed by general ones, the latter are to be held as applying to persons or things of the same kind with those which precede. *Kitchen* v. *Shaw* (*b*) is to the same effect. Now, in this section, the particular words comprise dwelling-houses, and buildings used for the purposes of trade, and it is probable that a brew-house or a malt-house would be considered *ejusdem generis* as a "warehouse, counting-house or shop;" but this cowhouse or stable appears to have been built for the purpose of being used in conjunction with the land; for the case states that it "was conveniently placed for the occupation of the claimant's *land*." [*Maule*, J. As I understand the case, the building was not only convenient for the occupation of the land, but also "suitable for the purpose for which it was erected," that is, as a cow-house or stable. Would it be contended that a building used by a cow-keeper or livery-stable keeper in *London*, if of sufficient value, would not give a qualification?] The keeping of a livery-stable is a trade. [*Tindal* C. J. That may be doubtful. (*c*)] The learned serjeant referred also to *Sewell*'s case. (*d*)

TINDAL C. J. I think that the word "building," in the twenty-seventh section of the reform act, is satisfied by the building, described in this case as a "cow-house or stable." The passage under consideration begins, it is true, with the enumeration of "house, warehouse, counting-house or shop;" and when we are told, that the "other building" which follows these words must be *ejusdem generis* with those that precede

(*a*) 7 *B. & C.* 96. 100.; 9 *D. & R.* 796.

(*b*) 6 *A. & E.* 729., 1 *N. & P.* 791.

(*c*) See 6 *G.* 4. *c.* 16. *s.* 2. *Martin* v. *Nightingale*, 3 *Bingh.* 421., 11 *J. B. Moore*, 305.; *Cannan* v. *Denew*, 10 *Bingh.* 292., 3 *Moo. & Sc.* 761.

(*d*) *Manning's Proceedings in the Courts of Revision*, edition of 1836, pp. 150. 154.

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it, I am disposed to think that the building under consideration falls under that description. There certainly are buildings which do not come within the meaning of the act; for example, a bridge, or a drain made for agricultural purposes; both of which may, in one sense, be termed "buildings," but certainly are not of the kind referred to in the act. If we were to exclude the building now under consideration, we must necessarily exclude many other buildings of a similar kind, such as a room erected for the purpose of obtaining a prospect; or a dairy standing detached from other buildings; both of which I should consider would fall under the general description of "building."

I think, therefore, that the decision of the revising barrister ought to be reversed.

COLTMAN J. I am of the same opinion. The building in question is one that may very properly be occupied with land; but I do not think that it is thereby taken out of the operation of the act, which seems to be less restricted than has been contended for. I think the act embraces all buildings erected for the purposes of dwelling or business; and agriculture is certainly a business.

ERSKINE J. I am of the same opinion. There is nothing in the act to limit the meaning of the term "building" to one used for the purposes of trade. A house may be used either for trade or habitation. Even if the term were so limited, there is nothing in this case to exclude the building under consideration. A cowhouse or a stable may be used for the purposes of trade. I think the building in question is *ejusdem generis* with those specified in the act. A building may be erected for the purposes of a reading-room — that is

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neither for trade nor habitation — but that would, I think, be sufficient to give a qualification.

MAULE J. I agree that the term "building" in this act is not to be taken in its largest acceptation; but that it must be explained by the accompanying words; and therefore such buildings as the Lord Chief Justice has referred to would be excluded from the act. So a wall inclosing a space of ground might be a building worth 10*l.* a year; but it would give no qualification. It is contended that the buildings specified in the act are such as are generally used for trade; but it does not follow that the act is limited to buildings erected solely for that purpose. The building under consideration might become a warehouse, if goods were stored in it; or it might become a shop, if they were sold there. I have no doubt whatever, that this building is sufficient under the twenty-seventh section of the reform act.

Decision reversed. (*a*)

Austin applied to the court for an order directing the register to be altered by inserting the claimant's name, under the 6 & 7 *Vict. c.* 18. *s.* 67.

(*a*) In each of the following cases (which were decided by the same revising barrister), the counsel for the respondent admitted they could not distinguish it from the principal case.

Borough of *Ludlow.*

Peele, Appellant; *Downes*, Respondent.

In this case the building was described as a stable substantially built of stone. The roof being tiled and the door having a lock; and as being conveniently placed for the occupation of the claimant's lands.

Cockburn, for the respondent.

Borough of *Bridgnorth.*

Peele, Appellant; *Williams*, Respondent.

This was a consolidated appeal. The buildings were severally described as a stable and cow-house, substantially built with foundations and walls of brick or stone; the roofs being tiled, and the doors having locks; and as being conveniently placed for the occupation of the claimant's lands.

W. R. Cooke, for the respondent.

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TINDAL C. J. There is no necessity for any formal order on the subject. It will be done of course.

Northern Division of the County of WARWICK.

Nov. 23.

JOHN WEBB, Appellant; The Overseers of the Parishes of ASTON Juxta BIRMINGHAM, and of BIRMINGHAM, Respondents.

In an appeal from the decision of a revising barrister under the 6 & 7 *Vict. c.* 18., the appellant has the right to begin.

Where in the statement of a case by the revising barrister a material fact is omitted, the court will not allow it to be supplied by consent.

THIS was a consolidated appeal under the 6 & 7 *Vict. c.* 18. *s.* 44.

Mellor, for the respondents, when the case was called on (*a*), claimed the right to begin, comparing it to a special case from sessions.

TINDAL C. J. In a case from sessions, the party who seeks to set aside the order of the justices, is in the situation of a party shewing cause against a rule. This is more in the nature of an appeal to the Privy Council, where the appellant always begins.

F. Robinson, for the appellant, then read the case as follows: —

Where a case is remitted to the revising barrister (under sect. 65.) in order that it may be more fully stated, the course is for the master to return it to the appellant with a note of the facts to be supplied, and for the appellant to transmit the same to the revising barrister.

A lessee of several houses (all locally situate within a borough) for the residue of a term of not less than sixty years, one such house being of sufficient value to confer a vote for the borough under 2 *W.* 4. *c.* 45. *s.* 27., if the remaining houses are each of less than that value, but collectively of more, is not deprived by sect. 25. of his right to vote for the county under sect. 20., in respect of such remaining houses.

(*a*) *Monday, November* 13.

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William Hickman was objected to as not being entitled to have his name retained upon the list of voters for the division, in respect of property situate within the parish of *Aston* juxta *Birmingham*. The revising barrister retained the name, subject to the opinion of the court of Common Pleas upon the following case.

William Hickman was the lessee of a term originally created for ninety-nine years, of which three years had expired. The lease comprised several houses, the aggregate annual value of which was 220*l*. All the property was situate within the parish of *Aston* juxta *Birmingham*, and also within the borough of *Birmingham*. One house was worth more than 10*l*. a year, and the remainder were each respectively worth less than 10*l*. a year. Each house was occupied by a distinct tenant, and in no case was any land occupied jointly with a house.

The particulars of the qualification were stated to be "lease of houses and buildings for years." *Hickman* was examined, and stated that he relied (*a*) upon those which individually would be worth less than 10*l*. a year, but collectively were worth more than that amount. It was contended, on the part of the objector, that under the 2 *W.* 4. *c.* 45. *s.* 25., *Hickman* had no right to a county vote, because one of the houses comprised in the lease was of sufficient annual value to confer upon the occupier a vote for the borough of *Birmingham;* that the county vote was given in respect of the estate and interest which *Hickman* had therein as lessee; that he was possessed, not properly of the land, but of the term of years, which is the estate and interest that passes for that time; that the term of years was an entirety, extending over the whole property comprised in the lease,

(a) *Quære,* whether the claim, *which is the act of the party,* does not import the assertion of a title to county registration in respect of *all* the houses.

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and inasmuch as it comprehended the house of 10*l.* annual value, the same came within sect. 25. of the act.

The revising barrister held, that as it is said in sect. 20. of the act, "Every person who shall be entitled as lessee to any lands for the unexpired residue of any term," &c., the word "term" was used in its popular sense as applicable to "time," rather than in its legal sense; and the more so as the word "term" is not used in sect. 25., and that the claim here was for property to which "he is entitled as lessee for a term" (or time), and which does not confer a vote for the borough, and which, therefore, does not disqualify him from being upon the county register.

(Signed) *J. D. B*—, revising barrister.

The case then stated that the claims of five other parties depended upon the same question, and that they were consolidated with the case of *Hickman;* and that the overseers of *Aston* juxta *Birmingham* and of *Birmingham* were named respondents.

(Signed as above.)

TINDAL C. J. The case does not distinctly state that the other houses were collectively of not less than 10*l.* annual value; nor does it state that the party objected to had been in possession twelve calendar months before the 31st of last *July.*

Robinson stated that he was prepared to admit these facts.

TINDAL C. J. I think they must be supplied by the revising barrister from his notes. They are material facts in the case, and we cannot allow them to be supplied by the admission of parties. The case must be

remitted to the revising barrister under sect. 65. of the registration act. (a)

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The case having been remitted to the revising barrister, was returned with the following amended statement:

After reciting that the statement of the matter of the appeal had been remitted to him to be more fully stated on these points, that is to say,

First, whether the residue of the houses respectively under 10*l.* were proved to be together of the value of 10*l.* clear;

Secondly, whether it was proved that the claimant had been in possession twelve calendar months prior to the last day of *July* preceding;

The revising barrister found that the residue of the houses respectively under 10*l.* were proved to be together of the clear yearly value of not less than 10*l.* over and above all rents and charges payable out of and in respect of the same:

And that the said *William Hickman* had been in receipt of the rents and profits thereof to his own use, for twelve calendar months previous to the last day of *July* preceding.

(Signed as above.)

Robinson now (*November* 23d) argued the case for the appellant. The question raised in this case is, whether a party, who is lessee of several houses for the residue of a term of not less than sixty years, all such houses being situated within the limits of a borough, is entitled to vote for the county, one of the houses being

(a) It was ultimately decided that the statement of the case should be returned by the master to the appellant, and that it should be remitted by him to the revising barrister, with a memorandum of the facts that were required to be supplied.

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of sufficient value to confer a vote for the borough, and the remaining houses being each of less than that value, but collectively of more, over and above all rents and charges.

By the 2 *W.* 4. *c.* 45. *s.* 20., the right of voting for a county is conferred upon persons who are entitled, whether as lessees or assignees, to any lands or tenements, for the unexpired residue of any term of not less than sixty years, of the annual value of 10*l.*, over and above all rents and charges. The party objected to in this case would undoubtedly be entitled to vote if that section stood alone. But by sect. 25. it is enacted, that no person shall vote for a county in respect of his estate or interest as such lessee or assignee, &c. in any house, &c. such house, &c. being of such value as would, according to the provisions of sect. 27., confer on him or on any other person, the right of voting for any city or borough.

The party objected to here has clearly such an estate or interest as lessee in one house, as would confer on the occupier thereof the right of voting for the borough; and it is submitted that he is therefore excluded from voting for the county in respect of the residue of the property; the whole being held by him for the same term.

As a matter of history, it may be stated to have been clearly the intention (*a*) of those who framed the reform act, to exclude persons in the situation of the present party from voting for counties; and the better opinion appears to be, that such intention has been effectuated by the words of the act. In *Elliott on the Qualification and Registration of Electors*, there is the following passage (*b*): "It has been said that it was the intention of the framers of the reform act to prevent a leaseholder,

(*a*) *Vide post*, 26. (*b*) Page 135. 2d ed.

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for any term of years, of premises situate within a borough, from voting, in respect of such lease, for a county, if *any part* of the property comprised in the lease would confer the right of voting for the borough, and this probably was so. In the debate on the reform bill (*Mirror of Parliament*, 24th *May* 1832), Lord *Brougham* said, 'The twenty-fifth section deals with the right now conferred for the first time, viz. copyholders who hitherto had no right, and leaseholders who now acquire it for the first time; accordingly they are deprived of the right of voting for the county in respect of property in the borough, or rather they have it not; this twenty-fifth clause prevents them from acquiring it.' See also the debate on an explanatory clause, moved by Sir *James Graham*, on the 22d of *June* 1836. It has however been contended, upon the wording of this section, that a double right of voting in respect of property, comprised in one lease may be created thus, and that the practice exists in large boroughs to some extent: *A. B.* is the lessee of a term for ninety-nine years of a piece of land within a borough, on which has been erected a house and two other separate buildings; the house is occupied by himself, and being of the annual value of 10*l.*, gives him a right to vote for the borough; the two other buildings, separately of less value than 10*l.*, are let to two different tenants; the rent of the two together amounts to more than 10*l.* Upon these facts it is said that the original leaseholder has also a right to vote for the county in respect of his interest in these latter buildings, being of the annual value of 10*l.*, but not occupied in such a manner as would confer on any one the right of voting for the borough. It does not appear at all clear that this would be the proper construction of this clause; at all events it cannot be a point of much practical importance."

The case, however, will most properly be argued

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upon the words of the statute. The franchise is thereby conferred upon a party in respect of his *estate* or *interest*, as *representing* the *term*, in the legal sense of that word, which is not used in its popular sense, as applicable to *time*, as the revising barrister has supposed. In *Co. Litt.* 45. *b.* a "term" is thus defined — "*Terminus*, in the understanding of the law, doth not only signify the limits and limitation of time, but also the estate and interest that passeth for that time. As if a man make a lease for twenty-one years, and after, make a lease to begin, *a fine et expiratione prædicti* termini *xxi annorum dimissi;* and after, the first lease is surrendered, the second lease shall begin presently; but if it had been to begin *post finem et expirationem prædictorum xxi annorum*, in that case, although the first term had been surrendered, yet the second lease should not begin till after the twenty-one years be ended by effluxion of time; and so note the diversity between the term for twenty-one years, and twenty-one years." And in 2 *Blac. Com.* 143. it is said — "Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, *terminus;* because its duration or continuance is bounded, limited, and determined."

It seems clear from the proviso at the end of the twentieth section — which speaks of the right to vote "in respect of any such term" — that the legislature intended to confer the franchise with reference to the term, as implying an estate of a certain quality. The whole enactment relates principally to the length of the time for which the term is created, and though reference is made to the value of the premises, yet that is but a secondary consideration. The important matter is the length of the original term without reckoning how much longer it has to run; the franchise being given *propter dignitatem* of the original estate. If this be the true con-

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struction of the act, the twenty-fifth section limits the operation of the twentieth, and excludes the right now contended for. The true test cannot be the time during which the party is entitled to the property; inasmuch as it is immaterial how much of the term remains. A sixty years' term with only one year to run, will give the franchise, though the annual value be but 10*l.*; whilst a twenty years' term with nineteen years to run, will not confer the right unless the annual value be 50*l.* It has been considered, therefore, that two terms cannot be joined together for the purpose of making out the requisite estate, as the statute speaks of "any term" in the singular only. (*a*) In *Elliott on Registration* (*b*) it is said, "There does not appear to be any thing in the wording of this section which would warrant the supposition, that two leases may be joined together for the purpose of making up the value." [*Maule* J. Might not two different leases of the same property be joined together for that purpose?] The argument has reference to leases of different premises. [*Tindal* C. J. Would you say that a party could not join a present lease and a lease in reversion?] Probably he could not. (*c*) Where it has been intended that two or more terms might be joined together, the legislature have employed apt language to express that intention; as in the 22 & 23 *Car.* 2. *c.* 25. *s.* 3., conferring a qualification to kill game upon persons "having *lease or leases* of ninety-nine years," &c.

If these two terms cannot be joined together for the purpose of conferring the franchise, neither can one term be divided for that purpose. The term must be one and entire. There is nothing in the twentieth or twenty-fifth section to authorise the registration of the assignee, or sub-lessee of *part* of the premises. A party

(*a*) *Vide Hopkin's* case, *Deane*, 202.

(*b*) Page 117. 2d ed.

(*c*) *Antè*, Vol. IV. 1018.

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entitled to vote in respect of an office, would, by assigning a part of such office, lose his vote though he might retain a sufficient qualification in value. And a termor who assigns part of his term stands in a similar position. He is no longer entitled in respect of his estate or interest as lessee. [*Maule* J. Would he not have an estate, as lessee, in the premises?] It is submitted that he would not have such an estate as is contemplated by the act. [*Tindal* C. J. If the property was divided into twenty tenements, and one of them was of sufficient value to confer the franchise for the borough, your argument would be, that the party would not have a vote for the county, the franchise being exhausted upon the borough vote?] The argument undoubtedly must go to that extent. And this would not impose any hardship peculiar to the leaseholder, whose elective franchise is but a new creation of the law; for, by the twenty-fourth section of the reform act, the ancient right of the freeholder is equally cramped. By that section, no person can vote for a county in respect of any freehold house, &c., or of land occupied with a house, &c., which would confer on him a vote for a borough. (*a*) So that though he might have a freehold estate within a borough which might be worth five hundred times 40*s.*, still, if he also occupied a house within the borough of the value of 10*l.* and had the land in his own occupation, he could not vote for the county. [*Tindal* C. J. Then you would say, that if a party had 1000*l.* in land, held together with a house of 10*l.* annual value situate within the borough, he would not have a vote for the county?] It appears from the very words of the act, that he undoubtedly would not. [*Maule* J. It seems that, by the twenty-seventh section of the reform act, land can only be joined to a

(*a*) See *Manning's Proceedings in Courts of Revision*, p. xix.

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house in a borough for the purpose of making up the requisite value, in cases where they are jointly occupied "as owner" or "as tenant under the same landlord."] Committees have held that, under the twenty-seventh section, a party might join a house held by him as owner, with land also held by him as owner, though under a different title, and that this would give him a vote for a borough. But if they were both held by the same title, and the house were of sufficient value to confer a vote for the borough, he would be deprived of his vote for the county in respect of the land, by the twenty-fourth section. And the right of the leaseholder is equally modified by the twenty-fifth section.

The argument amounts briefly to this. If any part of the term gives a vote for the borough, the termor cannot have a vote for the county in respect of any other part of it; inasmuch as the term must necessarily comprehend all the premises. [*Maule* J. A tenant in fee is tenant of the whole and of every part. It is the same with a tenant in tail. Why should not the same rule prevail with respect to a tenant for years?] A freehold may be acquired at various times. A term, on the contrary, is acquired at one and the same time.

In the present case, the nature of the qualification is described as "a lease of houses and buildings:" this cannot, of course, refer to the indenture or instrument of demise. [*Maule* J. There is no objection taken upon that point.] It is not pointed out as an objection; but the remark is made to shew that, by the word "lease," the *term* or *estate* was intended. In the schedule (H.) to the act, No. 3. a "lease" is mentioned as an instance of the qualification. [*Maule* J. The right of voting can hardly be limited by the schedules to the act.] Still, upon the principle that *juncta juvant*, they may assist in shewing the intention of the legislature.

It appears clearly to have been a governing object of

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the act to keep the county voters separate from those for the borough. A great mischief would accrue from giving the franchise to a person who has not the whole term. It is manifest that the legislature never contemplated an indefinite sub-division of the title to vote. It was intended that two parties only should vote in respect of a term—the lessee, or assignee of a term—and the sub-lessee, or his assignee, who is in actual occupation of the premises demised. But it would follow from the construction contended for on the other side; first, that the lessee would be entitled to vote; secondly, that he might parcel out the premises, by assignment, to numerous parties, each of whom would be entitled to vote; and, thirdly, that each of such assignees might grant numerous sub-leases to tenants who, if they were in actual occupation, would also have the right to vote. In *Russell on the Reform and Boundary Acts*, p. 25., the author commenting upon the twentieth section of the reform act, says: "The due operation of this section would seem to prevent all persons from voting in respect of the same lease, excepting two, viz. the party first taking from the ground landlord, and the occupying under-lessee. The policy of such a provision is obvious, as, but for some such check, the creation of long terms might be made the means of fraudulently multiplying votes; for a lessee for seventy years might grant an under-lease for sixty-nine years to another, and he again for sixty-eight years to a third, and so on." [*Maule* J. If a man had a long term for 999 years, and were evicted by title paramount from a part of the premises of the annual value of 1*s.*, would you argue that he would lose his vote, though he might retain property to the annual value of 1000*l.*?] There may perhaps be a difference in that respect between an eviction and an assignment. In the latter case, the lessee parts with the possession by his own voluntary act. But the

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eviction would shew that the land from which the lessee was evicted, never legally formed part of his term. (*a*)

It cannot be said that the party objected to here is not registered "in respect of his estate or interest as a lessee in a house of such value, as would confer the right of voting for the borough" within the words of the twenty-fifth section of the reform act, that is, registered in respect of his estate in the house found to be of the annual value of 10*l.*; for if, as is contended, the "term" means the whole estate; he is in law registered in respect of *all* the premises, including the other houses as well. [*Maule* J. If he had sent in a claim to be registered as a voter for the county in respect of so many houses, without mentioning the one that would give him a vote for the borough (*b*), could it be said that he had claimed in respect of that house?] Such it is submitted would be the effect of his claim, inasmuch as he has the entire estate in the whole of the premises.

But it is not necessary in the present case to contend that the termor will lose his vote for the county if he has assigned any part of his estate. It is sufficient to say that the revising barrister must judge of the estate or interest of a party from what he has in him at the time. Here the *whole* estate is in him; and if it appears that any portion of such estate is sufficient to confer the right of voting for the borough, he cannot vote for the county. He would clearly be entitled to apportion the rent and charges reserved by the lease over all the houses contained in the demise; *M'Kee*'s case. (*c*) He has the benefit therefore of the other houses in ascertaining the value of the 10*l.* house; and he cannot ob-

(*a*) In the case of a partial assignment, or of a partial eviction, after the period for giving notice of objection had expired, there would be no means of testing the sufficiency of the qualification, or of ascertaining whether the yearly value of the residue was above or was below ten pounds.

(*b*) That would appear to be the correct mode of claiming, *vide suprà*, 15 n.

(*c*) *Alcock, Reg. Ca.* 256.

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ject to being clogged with that house as a burden, as forming part of his entire estate or interest.

It is submitted, therefore that — looking at the precise words of the twenty-fifth section; at the obvious intention of the legislature to keep separate the two classes of voters for the borough and for the county; at the principle that the franchise is given in respect of the dignity of the estate from the original inception of the term, and not of the time it may have to run; at the mischief that would follow from the possible creation of an indefinite number of voters out of the same estate, and to the circumstance that a leaseholder will be no worse off than a freeholder — the decision of the revising barrister in this case ought to be reversed.

Mellor for the respondents. The intention of the legislature can only be gathered from the language of the statute, and is not to be sought for by reference to extrinsic matters, such as debates in parliament. (*a*) And the statute is to be construed according to its plain meaning without having recourse to subtle distinctions and refinements. The franchise is clearly and distinctly conferred by the twentieth section of the reform act, and the only question is, whether it is taken away, in such a case as the present, by the negative words of the twenty-fifth section.

In the twentieth section there is nothing said as to the estate or interest of the party. It enacts that "every person, &c. who shall be entitled, either as lessee, or assignee, to any lands &c. of any term originally created, &c. shall be entitled to vote for a county." This language is sufficiently clear and precise. And that of the twenty-fifth section is equally so in restraining the right of voting for the county in respect of the party's "estate or interest, as lessee or

(*a*) *Antè*, 18. And see *Mann. Proceed.* 2d ed. 156, 157.

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assignee, in any house &c.; such *house* &c. being of such value as would confer on him or any other person the right of voting for any city or borough." This restriction is in terms confined to premises which would confer the right of voting for a borough.

The twenty-fourth section has been referred to for the purpose of shewing how far the right of a freeholder is affected. But by that section he is only excluded in respect of a house in a borough "occupied by *himself;*" and, therefore, his case has no analogy to that of a leaseholder.

If the argument contended for on the other side were adopted, a considerable bulk of property would be entirely unrepresented.

The eleventh section of the reform act for Scotland (*a*) permits two houses, &c. to be joined together for the purpose of making up the requisite franchise for a borough. Under that act some argument might possibly have been raised in favour of the position contended for upon the other side. But neither the reform act for England (*b*), nor that for Ireland (*c*), allows of such a construction. (*d*)

Even where the lessee had assigned part of the premises, there would still remain a privity of contract between him and his lessor in respect of such part. But it is sufficient to say that, whatever might be the effect of such an assignment, no such question arises in the present instance.

Robinson was heard in reply.

TINDAL C. J. It appears to me that the construction which the revising barrister has put upon the statute is correct, and that the party objected to is entitled to have his name retained upon the register.

(*a*) 2 & 3 *W.* 4. *c.* 65.
(*b*) 2 *W.* 4. *c.* 45.
(*c*) 2 & 3 *W.* 4. *c.* 88.
(*d*) See *Sweetman's* Case, *Alcock, Reg. Ca.* 27.

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By the twentieth section of the act to amend the representation, &c. (2 *W.* 4. *c.* 45.) it is enacted, that any male person of full age, and not subject to any legal incapacity, who shall be entitled, either as lessee or assignee, to any lands or tenements, whether of freehold or of any other tenure whatever, for the unexpired residue, whatever it may be, of any term originally created for a period of not less then sixty years (whether determinable on a life or lives, or not), of the clear yearly value of not less than 10*l.* over and above all rents and charges payable out of or in respect of the same, or for the unexpired residue, whatever it may be, of any term originally created for a period of not less twenty years (whether determinable on a life or lives, or not), of the clear yearly value of not less than 50*l.* over and above all rents and charges payable out of or in respect of the same, or who shall occupy, as tenant, any lands or tenements for which he shall be *bonâ fide* liable to a yearly rent of not less than 50*l.*, shall be entitled to vote for the county, &c. in which such lands or tenements shall be respectively situate; provided that no person, being only a sublessee, or the assignee of any underlease, shall have a right to vote in such election in respect of any such term of sixty years or twenty years as aforesaid, unless he shall be in the actual occupation of the premises. Now, there can be no doubt but the property possessed by the party objected to in this case falls distinctly within the description of property in that clause, the possession whereof confers the right of voting for a county. It appears to me that the word "term" used in that section, carries with it the *interesse termini* — the interest in the whole and every portion of the estate. (*a*) As far, therefore, as the twentieth section goes, I think it clear that the party here would have the right

(*a*) As to *interesse termini* in the ordinary and more restricted sense of an inchoate or embryo term, see *Co. Litt.* 46 *b.*, and the cases collected, 2 *Tho. Co. Litt.* 403, note, (A.)

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of voting for the county in respect of the premises mentioned in the case.

But then the question is, whether — this right having been clearly given by the twentieth section, — the restriction in the twenty-fifth section as clearly takes away that right. The latter section enacts that no person shall be entitled to vote for a county in respect of his estate or interest, as a copyholder, &c., or as such lessee or assignee, or as tenant and occupier, as aforesaid, in any house, warehouse, counting-house, shop or other building, or in any land occupied together with a house, &c., such house, &c. being, either separately, or jointly with the land so occupied therewith, of such value as would, according to the provisions in the act after contained, confer on him, or on any other person, the right of voting for any city or borough, whether he or any other person shall or shall not have actually acquired the right to vote for such city or borough in respect thereof.

Now all that is stated in this case is, that, with respect to one house, the party objected to, or rather his tenant, has a right to vote for a borough. The party is still in possession of the term, as to the remainder of the property; and I am of opinion that the restriction in the twenty-fifth section is partial, and that the one particular house falls within the predicament therein mentioned, but that as to the residue of the property, the right of the party to vote for the county remains.

COLTMAN J. I am of the same opinion. I cannot perceive any thing in the twentieth section to warrant the construction put upon it by Mr. *Robinson*. The effect of his argument is, that a lessee has an interest in the *whole* of a term — but not in merely a *portion* of it. But it appears to me that his interest is equal in every part as well as in the whole. Nor does it appear to me that by that section, any such entirety of the term was

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contemplated as he has contended for. It is required that the premises should be of a certain value "over and above all rents and charges payable out of or in respect of the same." Now the rents and charges may undoubtedly be considered as payable out of the whole estate; but I think that, upon the proper construction of the statute, they would be considered as apportionable among the different tenements. Then it is clear that the twenty-fifth section only takes away the right of voting for a county, in respect of the house &c. which would confer the right of voting for the borough.

ERSKINE J. I am of the same opinion. It appears that the party objected to in this case is possessed, as lessee, of premises, and that he would thereby be entitled to vote for the county under the twentieth section of the act. And the question is, whether this right is clearly taken away by the twenty-fifth section. For as the right is clearly given by the twentieth section, I agree that we must be satisfied that it is clearly taken away, before we can hold that the party is deprived of that right. It appears that the premises, held by the party objected to, consist of several houses situated within a borough. These premises are let by him. That fact would not take away his right to vote. And I think that the language of the act does not reach this case. (His lordship read the twentieth and twenty-fifth sections of the reform act.) If it had been intended to deprive a lessee of his right to vote for a county where *any portion* of his estate, having been underlet by him, would confer the borough franchise upon another party, the language would, I think, have been very different. It would perhaps have been said that "no person should be entitled to vote for a county in respect of his estate as such lessee, in any lands, &c. of which any house, &c. was of such value as would confer on him or any other person the right of voting

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for a borough;" but the language used is that the party shall not vote in respect of his estate or interest in any house, &c, "*such house*, &c. being of such value" as would confer the right of voting for a borough. Now the party here is not registered in respect of "any house" of such value as would confer a borough vote; and I think, therefore, that his original right to vote for the county, conferred by the twentieth section, is not taken away by the twenty-fifth.

MAULE J. I also think that the party whose vote is objected to in this case was entitled to be registered as a county voter. I cannot see any colour of argument against his right to vote for the county, except that which is founded upon the assumption that the word "term" in the twentieth section must comprehend the whole of the premises demised. No authority, however, has been cited to shew that such is the meaning of that word. Some doubt may possibly have been created by the expressions which the revising barrister has used in the case, as to the different uses of the word "term;" as though it possessed some peculiar legal meaning, such as has has been urged in the argument upon the part of the appellant. But I am not aware that any such meaning can be attributed to the word "term." If a party who is possessed of a term in ten houses, parts with his interest in nine of them, he is still entitled to "the residue of the *term*" in the remaining one. He retains the same quality and quantity and nature of interest as to the residue. The first step in the argument, therefore, appears to me to fail; and, in such a case, it is the first step that costs every thing.

What then is conceded to be granted by the twentieth section? For the purposes of the franchise, the estate of the leaseholder is put upon the footing of a *quasi* freehold. The right to vote is conferred by that section;

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is it taken away by the twenty-fifth? I cannot quite agree upon this point with my lord and my brother *Erskine* that the right so conferred must be *clearly* taken away before we could hold that the party was not entitled to vote. It appears to me to be sufficient, if we can see that it was intended to be taken away, although that intention may be obscurely expressed. Undoubtedly where the language of an enfranchising section is quite clear, and that of a disfranchising section is not so, the presumption would be in favour of the franchise. But in this case I think that the disfranchising clause not only does not clearly take away the right of voting, but that it clearly does not do so. (His lordship read the twenty-fifth section.)

The question, therefore, amounts to this. Is the party registered as a voter for the county, as having a right to vote in respect of his estate or interest in any house that would confer a vote for any borough? And I think it is clear from the facts that he is *not* so registered (*a*); and that the revising barrister was right in his decision.

Mellor then applied for costs under the seventieth section of the registration act. (*b*)

TINDAL C. J. said he did not think it was a proper case for costs, as some doubt seemed to have been thrown upon the case by the reasons given by the revising barrister.

COLTMAN and ERSKINE JJ. concurred with his lordship.

MAULE J. intimated that he thought it was a case for costs.

Decision affirmed without costs. (*c*)

(*a*) *Vide suprà*, 15 n.

(*b*) 6 & 7 *Vict.* c. 18.

(*c*) This case establishes, what had seldom been doubted, that a party who holds within a borough a sixty years' lease

of three houses, one above, and two under, 10*l.*, is entitled to a county vote in respect of the two latter, if together amounting to 10*l.* yearly value. But *quære* whether the *claim* (*antè*, 15.) ought not in such case to be made in respect of the *two latter* houses only. An objector then would only have to shew that both these houses do not furnish an annual value of 10*l.*, or that one of them alone *is* of that value; whereas the general words, "lease of houses for years" throw upon the objector the collateral burthen of shewing that the first house is of the value of 10*l.*, or that all three do not make up that amount.

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Borough of STOCKPORT.

WRIGHT, Appellant, The Town-Clerk of STOCKPORT, Respondent.

Dec. 6.

JOHN WRIGHT objected to the names of 23 parties being retained on the list of voters; the appeals against the decision in respect of their being retained

Rooms in a factory were let to cotton-spinners separately; the rents varying according to the size of the room. The approach to the rooms was, either by a common staircase leading from the entrance to the factory (to which there was a door which was never fastened), or by separate outside staircases, or by doors opening into the yard. Each tenant had his own spinning machine (which was worked by a steam-engine belonging to the landlord, it being part of each contract that the landlord should supply steam power), and also the exclusive use of his room, and the key to the door thereof:

Held, that the occupier of each room was the exclusive occupier of "a building" within the Reform Act (2 *W.* 4. *c.* 45. *s.* 27.)

The names of the landlord and all the occupiers were inserted in the rate-book under the column headed "occupier." The whole building was assessed under the head "gross estimated rental," at 129*l.* In the same way the amount of "rate," and the "total amount to be collected," were stated to be 25*l.* The "amount actually collected" was stated to be 23*l.* 2*s.* 6*d.*, and in the last column, headed "empty," was inserted the sum of 1*l.* 17*s.* 6*d.*:

Held, that each occupier was, within the same section, duly "rated in respect of the premises" which he occupied.

It was part of the agreement with each tenant, that the landlord should pay the rates, and the rent was higher in consideration of such payment. The whole of the rate, with the exception of what had been allowed for the "empty" portions (*a*), had been paid by the landlord:

Held, that such payment enured as a payment by each tenant.

(*a*) As to which *vide post* 53. n.

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were consolidated; and the town-clerk was ordered to be the respondent in such consolidated appeal.

There is a factory or building belonging to *Elkanah Cheetham*, as owner (*a*), consisting of four stories or floors in height, which he lets off to different persons for the purpose of cotton spinning. To each of these persons a distinct or separate portion of the building, consisting of one room, varying in size, is let, at a distinct rent; such rents varying from 10*l.* to 30*l.* per annum for a room, according to its dimensions. For these rooms each tenant has his own machines for spinning, which machines are worked by a power supplied by a steam engine belonging to and worked by and at the expense of the landlord, who also finds the main gearing or shafting, which communicates such power to the machines. It is part of the contract with each tenant that the landlord shall so supply such power.

Each tenant has the exclusive use of his room, and has the key to the door thereof. The approach to these rooms is, in some instances, a common staircase leading from the entrance to the factory, and upon which staircase the different doors to the rooms open. There is a door to such general entrance; but it is never locked or fastened. In other instances the rooms are approached by separate staircases from the ground outside the building; and in others by doors on the ground opening into the factory yard.

It is part of the agreement with each tenant that the landlord (*a*) is to pay the rates; and the rent is higher in consideration of such payment.

Upon the rate-books the landlord (*a*) and all the tenants appeared to be rated jointly, in the form following: —

(*a*) Upon the rate-book, *post* 35., the names of *two* owners appear.

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No.	Name of Occupier.	No. of Votes.	Name of Owner.	No. of Votes.	Description of Property rated, as Houses, Lands, Tithes impropriate, or Appropriation of Tithes, Coal Mines, saleable Underwood.	Name and Situation of Property.	Estimated Extent.	Gross estimated Rental.	Rateable Value.	Rate at 5s. in the Pound.	Arrears Due.	Total Amount to be collected.	Amount actually collected.	Present Arrears.	Amount not recoverable, or legally excused.	Empty.
	Orchard Street.							£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
4588	Elkanah Cheetham Samuel Howard Cheetham William Clayton Aquila Taylor Thomas Higham George Hankinson Abel Hyde William Plant Samuel Birch James Fisher Peter Bailey William Bunting James Hulme James Hambleton James Clarke Thomas Bamber John Deaville Thomas Anson	-	Elkanah Cheetham and Samuel Howard Cheetham	-	Factory, Warehouse, Steam-Engines, Steam-Pipes, Gearing and Shafting, and Gas-Pipes.	-	-	129. 0. 0	100. 0. 0	25. 0. 0	-	25. 0. 0	23. 2. 6	-	-	1. 17. 6

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The whole of the rate, with the exception of what was allowed for the portions which were empty, was paid up, and had been paid by the landlord in due time.

The case then stated that the points raised for the decision of the revising barrister were —

First, whether each of these rooms or floors so held was such a building as, under the 2 *W.* 4. *c.* 45. *s.* 27., would confer the right of voting upon its occupier.

Secondly, whether there was an exclusive occupation in each of such tenants, as required by the same clause.

Thirdly, whether each of such occupiers was duly rated in respect of such premises occupied by him.

Fourthly, whether each of such occupiers could be held to have duly paid the rate in respect of such his occupation, part of the rate having been foregone in respect of what was empty, and the whole of that which was paid having been in fact paid by the landlord.

And that upon each of these points the revising barrister decided in the affirmative, and retained the said names upon the list of voters.

(Signed) *R. G. T*——. Revising Barrister.

The case was argued in last *Michaelmas* term. (*a*)

Townsend for the appellant. First, none of the floors or rooms described in this case was such a "building" as would confer the franchise upon its occupier within the twenty-seventh section of the reform act. The words of the section are, "any house, warehouse, counting-house, shop or other building." Such "other building" must be of a like kind with those previously mentioned (*b*), and must at least be a separate erection, such as a mill or a factory; a room forming part of a building will not be sufficient. In *Brown* v. *Lord Gran-*

(*a*) *Monday, Nov.* 13th.

(*b*) See *Whitmore*, Appellant, *Bedford*, Respondent, *suprà*, p. 9.

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ville (*a*) it certainly was held that the word "buildings," in a watching and lighting act, would include sheds raised for the purpose of protecting engines; but there the sheds were separate and distinct structures. It may be argued that a "shop" or a "counting-house" (both of which are expressly mentioned in the twenty-seventh section, is, or may be, only a portion of a building; but it will be sufficient to answer that these *are* expressly mentioned in the act, and form well known and recognised portions of a building. If a room is sufficient to satisfy the term "building," a vault or a cellar might also be so held; but the effect of such a decision would be to extend the operation of the act to a very inconvenient length. Considerable difficulty has always been entertained as to the proper construction to be put upon this sentence in the reform act. In *Cockburn's Questions on Election Law*, p. 37., there is the following passage — "But a question of still greater difficulty arises as to the meaning of another of the descriptions of property enumerated in this section, namely the word 'building.' Indeed, it could scarcely have been possible for the legislature to have made use of a term more ambiguous, or more likely to lead to varieties of construction. In the strict sense of the word almost every erection, however rude and unfashioned, is a building; but it is quite obvious that a limit must be placed somewhere. Not every stone placed upon another can be considered as sufficient to confer the elective franchise. The difficulty however is, where to draw the line; and it certainly is not easy to adopt any criterion which will not be liable to objection: the decisions, as might naturally be expected, have been conflicting in the extreme. Some barristers have thought that, as the words 'other building' in the statute immediately followed the more par-

(*a*) 10 *Bingh.* 69.; 3 *Mo. & Sc.* 453.

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ticular specification of several species of buildings there mentioned, the meaning of the word must be restricted to such buildings as were *ejusdem generis* with those previously enumerated. Others, on the other hand, have been of opinion that the words of the act being general, and coupled with no qualification, whatever could fairly come under the ordinary appellation of a building must be considered as within the meaning of the statute. Therefore, in the case of cattle-sheds and similar erections, upon evidence being given by land-surveyors, or other competent persons, that such buildings came within the denomination of 'farm-buildings,' they held them within the meaning of the act."

The better opinion would seem to be, that the legislature contemplated buildings which were to be occupied with land. If it had been intended that the occupation of part of a building should be sufficient to give the franchise, such intention could easily have been expressed. Considerable mischief might ensue from holding the premises in this case sufficient to confer the franchise; as the consequence would be, that innumerable votes might be made to issue out of one building. If the occupier of one of these rooms had slept there with his family, as he had a separate key, it might have been considered as his dwelling-house, *domus mansionalis* (*a*); and it would have stood upon the same footing as chambers in the inns of court, or in the universities of *Oxford* and *Cambridge;* which latter, but for sect. 78. of the reform act, would undoubtedly confer the franchise. It is true that, for the purpose of sustaining an indictment for burglary, any building where a party sleeps is considered as his dwelling-house; such, for example, as a permanent booth in a fair (*b*); but that is an artificial meaning of

(*a*) See 3 *Inst.* 65.

(*b*) See *R.* v. *Smith*, 1 *Moo.* & *Rob.* 256. and note.

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the word "dwelling-house," which is adopted for the purpose of protecting the occupant.

Secondly, there is not an exclusive occupation of the room in question. It appears that there is one steam-engine attached to the premises, and that engine supplies the power by which the machinery in each room in the building is worked. The power is included in the contract; its value forms part of the rental. The case does not state the value of the power. But there can be no question that it gives an additional value to each room; for the value of the room does not arise from the use of the mere building, but from the use of the steam-power. In fact, each occupier has a licence to use the engine; and that fact makes the case resemble *Regina* v. *The Inhabitants of Mellor* (*a*), where it was held that a pauper, who had contracted with the owner of a mill for space for his carding machine, and the use of steam-power to work it, did not thereby gain a settlement. [*Tindal* C. J. The pauper there merely contracted for a standing-place; which, it was decided, was not a tenement.] The room in this case might possibly be considered a *tenement* (*b*); but that is not the word used in the reform act. The occupiers of the different rooms may be considered as tenants in common of the steam-power, as none of them had the exclusive control over it.

Thirdly, the party was not duly rated within the meaning of the twenty-seventh section, which provides that no person shall be registered for any premises, unless he "shall have been rated in respect of such premises to all rates for the relief of the poor in such parish or township during the time of such his oc-

(*a*) 2 *East*, 189.

(*b*) *Vide Westfaling* v. *Westfaling*, 3 *Atk.* 460.; *Gully* v. *Bishop of Exeter*, 4 *Bingh.* 290., 12 *J. B. Moore*, 591.

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cupation." Sect. 2. of the parochial assessment act (*a*) requires that every rate shall, in addition to other particulars, contain an account of every particular set forth at the head of the respective columns, in the form given in the schedule to the act annexed, as far as the same can be ascertained. The form there given requires several particulars which are omitted in the assessment of the premises in question, as appears by the rate set out in the case. (*b*) The schedule requires that the gross estimated rental of *each* occupier should be stated; but in the present assessment, the gross estimated rental of the *whole* of the premises is stated, although they are occupied by different parties. The same observation applies to the rateable value of the premises, and the amount at which each party is assessed. From the assessment, it is impossible to say at what sum each party is assessed; and that is a circumstance essential to give validity to the rate; *Rex* v. *St. Olave.* (*c*) If, indeed, the amount of the rate assessed upon each occupier could be collected from the other parts of the rate, it would be sufficient; and, as the rate professes to be at so much in the pound, if even the *rent* of each occupier were stated, it would be a good assessment; *Rex* v. *Inhabitants of Corhampton* (*d*); but here, nothing is stated except the gross rental of the whole premises. It does not even appear from the case how many rooms there are in the building; though it is alleged that the rent of the rooms varies according to the dimensions. [*Tindal* C. J. That would lead to the inference, that the rates upon the occupiers would also vary.] The gross amount of the rental of each party rated must appear, to give the parishioners an opportunity of appealing. The overseers have the right to inspect the rate-books; and they could not ascertain whether a party was entitled to be

(*a*) 6 & 7 *W.* 4. *c.* 96.
(*b*) *Suprà*, p. 35.
(*c*) *Burr. Sett. Ca.* 789.
(*d*) 2 *Dougl.* 621.

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put upon the list of voters, unless the books shewed at what sum he was rated. Nor does the rate contain any sufficient description of the premises occupied by the party. The building, or the particular room that he occupies, is in no way designated. If he were to change his occupation from one room to another, between the registration and the election, he would lose his qualification; *Regina* v. *Dodworth.* (*a*) [*Tindal* C. J. The law upon that subject appears to have been altered by the new registration act.] Not, it is submitted, as to the nature of the qualification. By the fifty-eighth section of the reform act, three questions might have been asked of the voter at the time of the election; first, as to his identity; secondly, whether he had already voted at that election; and, thirdly, whether he retained the same qualification for which he was registered. By the eighty-first section of the registration act, the two first questions are alone required to be put to the voter when he comes to the poll. A party would not now therefore be liable to an indictment, as in *Regina* v. *Dodworth*, for a false answer to the third question; but the objection to the right to vote is still available under the seventy-ninth section of the registration act (*b*); and a party who did not, at

(*a*) *Falc. & Fitzh.* 275. n. S. C. per nom. *Reg.* v. *Dodsworth*, 2 *Moo. & Rob.* 72.; 8 *C. & P.* 218. See also *Reg.* v. *Lucy*, 1 *Carr. & Marshm.* 511.; *Reg.* v. *Bowler*, *ibid.* 559.; *Reg.* v. *Ellis*, *ibid.* 564. n.; *Reg.* v. *Spalding*, *ibid.* 568. n.

(*b*) The 6 & 7 *Vict. c.* 18. *s.* 79. enacts, "That at every future election for a member or members to serve in parliament, &c. the register of voters so made as aforesaid, shall be deemed and taken to be conclusive evidence that the persons therein named continue to have the qualifications which are annexed to their names respectively in the register in force at such election: provided always, that it shall not be lawful for any person to vote at any election for a member or members for any county where the qualification annexed to the name of such person shall have appeared annexed to his name in the preceding register, and such person, on the last day of *July* in the year in which such register so in force was formed, shall have ceased to

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the time of the election, occupy the same premis which he was registered, would lose his qualifi [*Coltman* J. In what manner could the questi raised? The party would be entitled to vote name was on the register. Who would have the of questioning the vote? *Maule* J. A committee House of Commons would probably strike out th upon a scrutiny. A registered voter, who had mitted a felony, could not be prevented from vo an election; but a committee might strike out th *Welsby* (of counsel with the respondent). It appear by the seventy-ninth section, the register is to b clusive evidence as to the existence of the same q cation. The provision as to change of qualification a only to elections for counties; but in cities and bor all that is required is a continued residence with requisite distance up to the time of voting.] If t cupiers of this mill are rated at all, it appears fro assessment that they are rated only as joint occ of the whole building together with the landlord.

Lastly, the rates have not been paid by the parti jected to. By sect. 27. of the reform act it is require only that a party, to be entitled to be registered have been duly rated, but also that he "shall have on or before the 20th day of *July*, all the poor rat

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have such qualification, or shall not have retained so much thereof as would have entitled him to have had his name inserted in such register: provided also, that no person shall be entitled to vote at any future election for a member or members to serve in parliament for any city or borough, unless he shall, ever since the 31st day of *July* in the year in which his name was inserted in the register of voters then in force, h sided, and at the time of shall continue to reside, the city or borough, o sharing in the election city or borough, in the for which he shall clain entitled to vote, or with distance thereof required said recited act to entit person to be registered year."

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which shall have become payable from him in respect of such premises previously to the 6th day of *April* then next preceding." The rates in this case were paid by the landlord; but that is not a payment by the party. The learned counsel referred to *Dashwood*'s case. (*a*) [*Erskine* J. In *Regina* v. *The Inhabitants of South Kilvington* (*b*) it was held, that a payment of a rate by a landlord, under somewhat similar circumstances to the present, would not be sufficient to confer a settlement upon the tenant.] Nor would it be sufficient, *à fortiori*, to give a right to vote. Again, the assessment must be taken as one whole sum; and the whole of the sum assessed must be paid. It appears, however, from the assessment set out in this case, that the "total amount to be collected" (in respect of the assessment upon the whole premises) was 25*l.*; but that the "amount actually collected" was only 23*l.* 2*s.* 6*d.*; the difference of 1*l.* 17*s.* 6*d.* not having been collected in respect of some portions of the building that were "empty." The whole of the rate, therefore, had not been paid. In *Elliott on Registration*, 194. (*c*), the law upon the subject is thus stated—"It has generally been considered that the whole of the sum at which a party has been assessed in any rate must be paid. If, therefore, there has been a remission of the whole or any part of the rate, either by the overseers or by the magistrates, under the provisions of the 54 *G.* 3. *c.* 170. *s.* 11., the party so excused would not be entitled to be registered; assessment and payment being conditions imposed by the statute, upon compliance with which alone a person is entitled to the franchise." It is stated in the present case, that a part of the rate "had been

(*a*) *Manning's Proceedings in Courts of Revision*, 2d ed. 18. See also *Spanner's Case*, *ibid.* 66.; *Harvey's Case*, *ibid.* 110.; *Hervey's Case*, *ibid.* 116.

(*b*) 3 *Gale & Dav.* 157.

(*c*) 2d edit.

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foregone in respect of what was empty." [*Maule* J. That appears to be rather in the nature of a recital. In what may be termed the statement of the case it is said, "that the whole of the rate, with the exception of what was *allowed* for the portions which were empty, had been paid up."] It may be inferred from that statement, that a part of the rate had been remitted by the magistrates or the overseers; but such remittance would not be equivalent to a payment by the party, and therefore he would not be entitled to vote. [*Coltman* J. The justices have no power, that I am aware of, to remit the rate by reason of the premises being *empty*. The statute 54 *G.* 3. *c.* 170. *s.* 11. only authorises them to excuse persons who are unable to pay on account of *poverty*.] Perhaps there was a composition for the whole building, as it was included in one assessment. If the party here seeks to obtain the advantage of the consolidated assessment and payment of the rate, he must also take the disadvantage of the non-payment of a portion thereof. The mill is an entire building; it is rated as such; and the *whole* of it must be rated; and if the whole rate is not paid, the occupier of a portion of the building cannot successfully contend that his rate has been paid.

Welsby, for the respondent. First, the term "building" in the twenty-seventh section of the reform act is sufficiently satisfied by the room in question. It is clear that the franchise was intended by the legislature to be given to occupiers of certain portions of buildings. The term "other building" being *nomen generalissimum*, must undoubtedly be taken to apply to subjects *ejusdem generis* with "warehouse, counting-house or shop," which precede it, all of which are, or may be, portions only of a building. The act requires that the party should occupy some building, in which he either resides

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or carries on an ostensible trade or business. It is conceded by the other side, that if the room in question had been occupied for the purpose of a dwelling, it would have been sufficient, as constituting a "house;" and that concession puts an end to the case. If it is sufficient as a "house," it is sufficient as a "building." It does not the less become a "building" because it is not occupied as a "house." *Brown* v. *Lord Granville* is in favour of the respondent. The word "building" was there extended to charge a party with a tax; and a more limited construction cannot be contended for, where the object is to confer a right.

Secondly, the occupation of the premises by the party is sufficiently exclusive. The case expressly states that "each tenant has the exclusive use of his room, and has the key to the door thereof." It is in no way shewn that the steam-engine is in, or forms part of, the building. It is merely the source from which power is obtained; as to which, exclusive occupation is neither claimed nor required. It is as if a party had the exclusive occupation of a water mill, with the use of a stream, which was also common to others.

Thirdly, the party is duly rated. In considering whether each of the occupiers is "duly rated," the purposes of the reform act must be kept in view. It may be admitted that the rate is informal; but still the rating is sufficient, where the name of the party appears on the rate. The party so rated is *primâ facie* liable as occupier. He is, in fact, rated, though it may not appear *nominatim* for what premises. [*Maule* J. It is to be observed, that the landlords are upon the rate both as occupiers and owners; and the case states that they and the tenants appear to be rated jointly.] *Rex* v. *Olave* does not apply here; as the question there was not upon the validity of the rate. The second section of the parochial assessment act (6 & 7 *W.* 4. *c.* 96.) re-

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quires the rate to be in the form given in the schedule to that act; but the enactment, that "otherwise the rate shall be of no force or validity," applies only to the immediately preceding sentence, by which the declaration at the foot is required to be signed by the parish officers; but it does not apply to a case where a deviation has been made from the particulars stated in the earlier part of the section; *R.* v. *The Inhabitants of Fordham.* (*a*) If, on the other hand, this is to be treated as a void rate, no rate in fact having been made, then the name of the party is not required to be upon the rate. The only question is, whether the description of the party in the rate is sufficient for the purposes of identity. It is the fact of renting and occupying premises of the requisite value which confers the vote, and not the being rated. [*Tindal* C. J. It is also necessary that the party should *pay* his rates.]

Fourthly, as to the payment of the rate. There is a difference in this respect between such a payment as may be necessary to gain a settlement, and a mode of payment sufficient for the acquisition of a vote. In the former case the rating and payment of the rate are, under the 3 *W.* 3. *c.* 11. *s.* 6., the test of the ability of the party; but, under the reform act, the occupation of a house, &c., is, at least, the principal part of the qualification. *R.* v. *South Kilvington* was decided upon the authority of *R.* v. *The Inhabitants of Weobley* (*b*) where it was held, that an exciseman who was rated for his salary (where the rate was, in fact, paid by the collector without any deduction from the salary,) did not thereby gain a settlement. The reason for this decision is given by Lord *Kenyon* C. J. as follows — "If the rate had been paid by him, through the medium or by the hands of another, that would have been a payment by

(*a*) 11 *A.* & *E.* 73.; 3 *P.* & *D.* 95. (*b*) 2 *East*, 68.

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himself; but here he neither paid mediately or immediately. He was not affected by the payment at all. It was not deducted out of his salary, nor was his income diminished by it." The facts of that case are clearly distinguishable from those of the present. Here the payment does affect the party, being made on his behalf. It is, to all intents, a payment by him. The present case more nearly resembles that of *R.* v. *The Inhabitants of Axmouth* (*a*); where it was held that a custom-house officer, who was rated on account of his salary to the land-tax, and in fact paid the rate himself, though the money was either given to him for the purpose or allowed to him afterwards by the collector, gained a settlement in the parish in which he was so rated and paid. In *R.* v. *South Kilvington*, the case of *R.* v. *The Inhabitants of Lower Heyford* (*b*) does not appear to have been brought before the notice of the court. It bears strongly upon the present question. The facts were these — An attorney, for the convenience of his business, allowed his clerk to occupy rent free, and as an augmentation of his salary, a cottage and land near to the attorney's residence. The clerk was rated as occupier, but the attorney sometimes paid the rates; and when the clerk paid them, the attorney reimbursed him; it was held that the clerk gained a settlement by paying the parochial taxes. *R.* v. *Bridgwater* (*c*) and *R.* v. *Openshawe* (*d*) are also authorities to shew the payment in this case was sufficient. With regard to the question generally, Mr. *Rogers* has observed (*e*), as cited by Mr. *Elliott* (*g*), "A question has often arisen whe-

(*a*) 8 *East*, 383. See also *Rex* v. *Okehampton*, *Burr. Sett. Ca.* 5.

(*b*) 1 *B. & Ad.* 75.

(*c*) 3 *T. R.* 550.

(*d*) 1 *W. Bl.* 463.; *Burr. Sett. Ca.* 522.

(*e*) *Law and Practice of Elections*, p. 161 5th edit. p. 158. 6th edit.

(*g*) *On the Qualification and Registration of Parliamentary Electors*, p. 193. 2d edit.

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ther the payment of rates by the landlord, by an arrangement between him and the tenant, the latter being the party rated, that he should pay an additional rent in respect of the landlord paying the rates, or adding the amount of the rates to the rent, in order to reimburse the landlord, is a sufficient payment by the tenant, under sect. 27.? It would certainly seem to be so. In such a case the debt is the debt of the tenant; and the parish has no remedy against any but him: whoever, therefore, pays the rate, by so doing discharges the debt due from the tenant; it is therefore a payment for the benefit of the tenant." To which Mr. *Elliott* adds, "In *R.* v. *Cozens* (*a*) it was decided, that if the money is tendered by any other than the person rated — as by the landlord on his tenant's account, — it must be received."

It has been contended on the other side, that part of the rate having been remitted, the whole of the rate has not been paid. That argument rests upon the assumption, that the rate is assessed upon the entire premises. The fact, however, of a part of the rate having been remitted for the empty portion rather tends to shew that each portion, that is, each room, was put on the footing of a separate tenement, and that the rate was charged upon each occupier separately. (*b*)

If the question were to be determined by its reasonableness, there can be no doubt here but that each occupier *does* pay the poor-rate. He certainly pays an increased rent by reason of the landlord's paying the rate; and it can make no difference whether the occupier pays 10*l.* for rent and 3*l.* for rate, or 13*l.* for rent, in consideration that the landlord pays the 3*l.* for rate.

As to the argument respecting the number of votes

(*a*) 2 *Dougl.* 426.

(*b*) The court appear to have considered the assignment as *joint* in respect of the parties assessed and as *separate* in respect of the property rated.

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which it might be possible to create out of one building, the same objection might be applied where rooms are used for the purposes of habitation, or as shops or warehouses. No question is raised as to value.

Townsend, in reply. The building must be considered as merely auxiliary to the steam-engine. [*Maule* J. It would rather seem that the steam-engine is auxiliary to the building.] It cannot however be contended that there was an exclusive occupation of each room, since the taking comprised the power as well as the room; and there was clearly no exclusive occupation of the power. (*a*) The value of the power is included in the rental of the room; and though the question as to the sufficiency of the value of the room is not distinctly raised, yet it arises incidentally. The opinions of Mr. *Rogers* and Mr. *Elliott* were cited in *Regina* v. *South Kelvington*, but the judgment is in direct contradiction of those opinions. The decision rested upon the construction to be given to the sixty-sixth section of the poor-law amendment act (*b*), which enacts (almost in the same words as the twenty-seventh section of the reform act), that "no settlement shall be acquired by occupying a tenement, unless the person occupying the same shall have been assessed to the poor-rate, and *shall have paid the same* in respect of such tenement for one year." The present case is much stronger as regards the occupier, since he does not constitute the landlord his agent, to pay any specific sum; the latter, being rated for the whole building, pays in respect of the whole. It was competent to the occupier to procure himself to

(*a*) To constitute a joint occupation of the *power*, its application to some joint *purpose* seems to be necessary. The irrigation of *several* closes of *separate* owners, is not a *joint* enjoyment of a watercourse.

(*b*) 4 & 5 *W.* 4. *c.* 76.

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be specifically rated under the thirtieth section of the reform act.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

The first question submitted for our decision by the revising barrister is, whether each of the rooms or floors, held in the manner described in the case, was such a *building* as, under the twenty-seventh section of the "Act to amend the representation of the people in *England* and *Wales*," would confer the right of voting upon its occupier. And we are of opinion that each of these rooms, held in the manner described in the case, was such a building as to confer the right of voting upon its occupier. It is called in the case "a room;" it is described as a distinct or separate portion of the factory; each tenant is stated to have the exclusive use of his own room, and the key to the door thereof. And we think such a description and such a mode of occupation brings it as much within the meaning of the word "building," as a "shop or counting-house," both of which are expressly specified in the act.

The second question is, whether there was an exclusive occupation in each such tenant, as required by the same clause. And to this question we answer that the finding of the revising barrister in the case, to which we before adverted, appears to us to put an end to any doubt on the point: for the case finds that "each tenant has the exclusive use of his room, and has the key of the door thereof:" and it does not appear to us, that the landlord's engagement to employ steam-power communicating with each room, in order that the tenant may work his own machinery therewith, makes the occupation of the room itself by the tenant less exclusive than if there had been no such engagement. It seems to have no further bearing on the question of

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exclusive occupation than if the landlord had, by the agreement for the taking, contracted to furnish manual labour for the service of the occupier in their trade or business carried on in each separate room; or had contracted to provide a light in such a situation that it would illuminate equally all the rooms; observing that in the statement before us no question is raised as to the sufficiency of the annual value of the room itself, without the steam power, for the purpose of conferring a vote, whatever bearing that might have upon the case.

The third question submitted to us is, whether each of such occupiers was duly rated in respect of such premises occupied by him. In answer to which question it is, in the first place, to be observed that all that the act requires is, that the person claiming the right to vote, "shall have been rated in respect of such premises to all rates for the relief of the poor;" the object of this provision in the act appearing to be, that additional evidence should be thereby furnished of the actual occupation by the claimant during the twelve months made necessary by the act. And, with this object in view, we think it never could have been intended by the legislature that the rate, in order to be sufficient for the purposes of the act, must be so perfect in point of form, that it must be free from every objection which might be allowed to prevail against it in an appeal at the quarter sessions. Such a construction of the statute would place the vote of the claimant in extreme hazard from the ignorance or carelessness of the overseers; for the statute has given the claimant himself no power to correct or controul any error in the rate, but has limited his application to the overseer, by section 30., to "a claim *to be rated* to the relief of the poor;" and in the same section has required no more from the overseer, than "to put the name of the occupier on the rate for the time being." The claimant, therefore, has no opportunity of rectifying any error as to the particulars of

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the rate, except by an appeal to the quarter-sessions, for which the time might not be sufficient, and the expense would be great. We think, therefore, that if the rate be in such form that the name of the occupier, the premises for which he is rated, the rateable value thereof, and the amount of the rate appear, it is a sufficient rate within the intention of the act. (*a*) And, looking at the rate now in question, it appears that all the persons who are claimants are jointly rated by their respective names; they are rated for premises, which are therein described a "factory, warehouse, steam-engines, steam-pipes, gearing and shafting, and gas-pipes;" and it appears by the case, that the factory comprehends all the rooms which are occupied by each of the claimants respectively; so that each claimant, being rated for the whole factory, is rated for that part of it which he occupies himself; and as to the annual value of the property, that is, of the whole of the property, it is stated expressly in the rate; as is also the amount of the rate itself. We think, therefore, that each occupier is rated in respect of the premises occupied by him, within the meaning of the act.

The fourth question submitted by the revising barrister is, whether each of such occupiers can be held to have duly paid the said rate in respect of such his occupation, part of the rate having been "foregone" in respect of what was empty, and the whole of what was paid having been in fact paid by the landlord. From the statement in the case, it appears that the whole of the rate, with the exception of what was allowed for the portions which were empty, was actually paid by the landlord; so that the rate must have been paid for every part of the premises that was in the actual occupation of any one; and the real question does not arise upon the nonpayment of the rate (*b*), but

(*a*) *Vide Cowderoy's* case, *Mann. Proc.* 2d ed. 17.

(*b*) As there was no power to remit any portion of the rate

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upon the payment thereof by the landlord under an agreement with the tenant. This latter question has accordingly been argued before us, and many decisions of the court of Queen's Bench have been brought in review, in which the question has been, whether a settlement has been gained by paying the public taxes and levies of a parish, in cases where the tenant has been rated, but the rate has been paid by the landlord. It appears, however, to us to be unnecessary to consider the analogy which those cases may bear to that which is now under consideration, inasmuch as there is one circumstance in the present case which essentially distinguishes it from those cited; for in the case now under consideration, all the claimants are rated as *joint* occupiers, and the rate is paid by two of them; not by one who is a stranger to the rate, as the landlord in the cases referred to always was; and we think it impossible to contend that, after a payment of the rate by any one of the parties so *jointly* rated, the fact of payment by each and every of them can be brought in question; such payment by any of the parties so jointly rated must enure to the benefit of all, and is virtually a payment by each.

Therefore, we think, the persons rated have paid the poor-rate within the meaning of the statute; and we come to the determination that the decision of the revising barrister was right.

Decision affirmed.

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on the ground of the premises being empty (*suprà*, 44.), this would seem to be a simple case of nonpayment by *A.* and *B.* of part of a rate to which they were jointly assessed in respect of a several occupation; and unless there were some machinery for apportioning the 25*l.* amongst the occupiers, and the reform act allowed of such apportionment, it would appear to be immaterial whether the "amount actually collected" was 23*l.* 2*s.* 6*d.*, or 2*s.* 6*d.* only; the apportionment in respect of the empty house being a nugatory act. And see *Allen's* case, *Mann. Proc.* 2d ed. 90. *Snowden's* case, *Ib.* 203. *Abethell's* case, *Ib.* 204.

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Borough of CHATHAM.

Dec. 6. WILLIAM HUGHES, Appellant; Overseers of the Parish of CHATHAM, Respondents.

A., the master ropemaker in a royal dockyard, had, as such, a house in the dock-yard for his residence, of which he had the exclusive use, without paying rent, as part remuneration for his services, no part of it being used for public purposes. The house was stated in the case to belong to the lords of the admiralty. (*a*) If *A.* had not had it, he would have had an allowance for a house in addition to his salary:

Held, that *A.* occupied the house as tenant, within 2 *W.* 4. *c.* 45. *s.* 27.

A. was rated to the poor-rate as occupier. The rates were paid by the paymaster general, also in part remuneration for *A.*'s services. If he had paid the rates the admiralty would have repaid him:

Held, that as the payment was of a rate for which *A.* was liable, and as it was made on his account, and he gave value for it, there was a sufficient payment of rates *by him* within the same section.

WILLIAM HUGHES duly objected to the name of *James Burton* (and several others), being retained on the list of voters for the parish of *Chatham*, within the said borough.

The facts of the case of *James Burton* were as follows: —

The party objected to occupied a house in the dockyard at *Chatham*, of the value of 40*l.* per annum from *July* 1836, to *September* 1842, when he removed to a house in *Milton Terrace*, *Chatham*, about a mile from the dockyard, where he now resides. The house in *Milton Terrace* he hires of the landlord in the usual manner, and pays a rent of 50*l.* per annum. He is rated for it, and pays such rates in the ordinary way; and no question arises in respect of that house. With regard to the house in the dockyard, it belongs to the lords commissioners of the admiralty. (*a*) The person objected to was master ropemaker in the dockyard, and as such he had the house as his residence. He paid no rent in money for it, but had it as part remuneration for

(*a*) *Quære*, if not to the Queen.

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his services. He had the exclusive use and occupation of the house for himself and family, and no part of it was used for public purposes; the office in which he performs his public services being away from it. He had the keys of all the doors, and no person but himself had any control over the house. He was rated to all the poor-rates and assessed taxes in respect of the house, in his own name as the occupier. Such rates and taxes were paid by the paymaster-general's clerk, at the pay-office at *Chatham*. They were so paid as part remuneration for his services. If he had not been allowed the house, he would have had an allowance for a house in addition to his salary; and now that he has not a house in the dockyard, he is allowed one guinea per week by the admiralty in lieu of rent and rates, under the name of "lodging money." If he had paid the poor-rates himself in respect of the house in the dockyard, instead of their being paid for him as above, the admiralty would have repaid him.

The case then stated that the revising barrister had disallowed the objection, and retained the name upon the list of voters, deciding that *J. Burton* occupied within the borough of *Chatham*, as tenant, a house of the clear yearly value of not less than 10*l.*, and had duly paid all the poor-rates and assessed taxes which had become payable from him in respect of such premises previously to the 6th day of *April* then next preceding.

And the seven other cases were consolidated with the principal case.

(Signed) *J. D. C—*, Revising Barrister.

The case was argued in last *Michaelmas* term (*a*), by

Kinglake, for the appellant. The question here is, whether officers or servants of the government occu-

(*a*) *Monday, Nov.* 13., and *Thursday, Nov.* 16.

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pying government premises, are entitled to vote in respect of such occupation. It will depend upon the construction of the twenty-seventh section of the reform act, which requires the party, entitled to vote, to be the occupier of premises "as owner or tenant." In this case the party is clearly not the owner; neither can it be said that he was tenant to the lords of the Admiralty; the occupation of the house being merely ancillary to the performance of the services of the party as master ropemaker to the dockyard. Possibly the revising barrister may have imagined, that as no part of the public services was carried on in the house in question, the occupation would be sufficient; but if the party occupied the house merely in the character of servant, it would not be sufficient, though such occupation were of a separate building, and beneficial to the occupier. There is a numerous class of cases where servants, occupying, in respect of their services, houses which belonged to their master, have been held not to gain a settlement under the poor-law, although there was no personal occupation by the master; *R.* v. *Minster* (*a*), *R.* v. *The Inhabitants of Kelstern* (*b*), *R.* v. *Bardwell* (*c*), *R.* v. *Cheshunt.* (*d*) In the latter case, *Bayley* J. observed, "The case of *The King* v. *Minster* only decided that the occupation of a tenement, which was wholly unconnected with the service, would confer a settlement, but that the occupation of one connected with the service would not." These cases, it is submitted, are not distinguishable from the present. *Ferrar*'s case (*e*) is still stronger. There, it appeared that the claimant, who was book-keeper to a distillery, exclusively occupied an entire house, the property of his

(*a*) 3 *M.* & *S.* 276.
(*b*) 5 *M.* & *S.* 136.
(*c*) 2 *B.* & *C.* 161.; 3 *D.* & *R.* 369.
(*d*) 1 *B.* & *A.* 473.
(*e*) *Alc. Reg. Ca.* 248. And see the *Irish* reform act, 2 & 3 *W.* 4. *c.* 88.

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employers, which communicated through a door, by a private passage outside, but not in front, into the distillery yard, besides having a hall door to the street. The claimant exclusively kept the keys of both these doors; his employers kept the house in repair and paid the taxes; and it appeared that if the claimant ceased to be book-keeper he would have to give up the possession of the house: and eleven judges held unanimously that the claimant was not entitled to be registered as a householder, under the *Irish* reform act. *R.* v. *The Inhabitants of South Kilvington* (*a*), *R.* v. *The Inhabitants of Snape* (*b*) are also in point. In *Bertie* v. *Beaumont* (*c*), it was held that a servant, occupying a cottage, with less wages on that account, did not occupy as tenant, but that the master might properly declare on such occupation as his own, in an action on the case for disturbance of a right of way over the defendant's close to such cottage. All these cases establish the principle that such an occupation as the present is not an occupation as tenant.

R. v. *Lady Emily Ponsonby and others* (*a*) may be relied upon by the other side. The court of Queen's Bench there held that the occupiers of apartments in *Hampton Court* Palace, under the circumstances there stated, *had* such an exclusive occupation as to render them liable to be rated to the poor-rate, upon the ground that they had a *beneficial* occupation; but no question was raised as to their occupation "as tenants." Upon that subject the law is clear. A servant is not ratable where his occupation is strictly for the benefit of his master; but where the occupation of the servant is beneficial to himself, independently of his master, then the servant is considered the occupier, within the statute of *Elizabeth*. In that case there was this important fact. The only servant of the Crown who had rooms in the

(*a*) 3 *G.* & *D.* 157.
(*b*) 6 *A.* & *E.* 278.
(*c*) 16 *East*, 33.
(*d*) 1 *G.* & *D.* 713.

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palace was the housekeeper. Her husband had been included in the rate; and it was agreed by the counsel on both sides that he was not ratable, and that the case should be argued with reference only to the ratability of the other parties. (*a*)

There is another class of cases with respect to the proper method of describing the possession of a house in an indictment for burglary. It has undoubtedly been held in certain cases, that where a servant is in actual and exclusive possession of a house it *may* be laid in an indictment for burglary as his dwelling house; but no conclusion with reference to the present question can be drawn from these cases. The general rule however is plain, that where a party employed in a public office is allowed to reside upon the premises belonging to the government, such premises cannot be considered as the dwelling house of such party; *William*'s case (*b*), *Burgess*'s case (*c*), *Peyton*'s case. (*d*) The same rule applies where the occupier is servant of a public company; *Hawker*'s case. (*e*) The decision in *Margett*'s case (*g*) undoubtedly seems to be at variance with these authorities. It has been doubted, however, whether that case can be considered as law. (*h*) But it has been recognised and acted upon in the recent case of *R.* v. *Witt*. (*i*) The prosecutor there was secretary to an insurance company, and lived with his family in the house, used as the office of the company, who paid the rent and taxes. The burglary consisted in breaking into a room in the house which was used for the business of the company. The house was laid as

(*a*) See 1 *G.* & *D.* 719. n. and 727.
(*b*) 1 *Hale, P. C.* 522. 527.
(*c*) *Kel.* 27.
(*d*) 1 *Leach*, 324.; 2 *East, P. C.* 501.
(*e*) 2 *East, P. C.* 501.; *Foster*, 38. See also *Picket*'s case, 2 *East, P. C.* 501.; *Maynard*'s case, *ibid.*; *Wilson*'s case, *Russ.* & *Ry.* 115.
(*g*) 2 *Leach*, 930.
(*h*) See 2 *Leach*, 931. n.
(*i*) 1 *Moody, C. C.* 248.

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the dwelling house of the prosecutor; and the recorder, upon the authority of *Margett's* case, thought the indictment was correct, but reserved the point for the judges; who were of opinion that the house was rightly described as that of the prosecutor, as his family and servants were the only persons who dwelt there, and they were the only persons who were disturbed by a burglary. The judges however would not say that the house might not have been described as the house of the company, but they considered that it might, with equal propriety, be stated to be that of the prosecutor. That, it is submitted, is the real distinction; the question in cases of burglary not being, as here, whether the party occupies the premises "as tenant," but whether he has such an occupation as is sufficient to support the averments in the indictment; for which purpose it is sufficient if he be actually in the occupation of the premises; the object of the law being to protect the actual occupier. [*Tindal* C. J. The indictment describes the premises as the dwelling house *of the prosecutor.*] That averment is satisfied by proving that the party dwelt in, and had exclusive occupation of, the house. *Brown's* case (*a*), and *R.* v. *Stock* (*b*) are to the same effect. In *Rees's* case (*c*), indeed, where a gardener lived in a house of his master, quite separate from the dwelling house of the latter, and had the entire control of the house he lived in, and kept the key, it was held, that it might be laid either as his house or his master's. So, in *Jobbing's* case (*d*), the prosecutor *G.*, a collier, resided in a cottage built by the owner of the colliery, for whom he worked. He received 15*s.* a week as wages, besides the cottage, which was free of rent and taxes. The prisoner being indicted for burglary in the dwelling

(*a*) 2 *East, P. C.* 501.
(*b*) 2 *Taunt.* 339.; 2 *Leach,* 1015.; 1 *Russ. & Ry.* 185.
(*c*) 7 *C. & P.* 568.
(*d*) *Russ. & Ry.* 525.

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house of the prosecutor, *Holroyd* J. was of opinion that, though the occupation and enjoyment of the cottage were obtained by reason of *G.* being the servant of the owner, and were co-extensive only with the hiring, yet his inhabiting the cottage was not, correctly speaking, merely as the servant of the owner; nor was it, either as to the whole or any part of the cottage, as his (the owner's) occupation, or for his use or business, or that of the colliery, but wholly for the use and benefit of *G.* himself, and his family, in like manner as if he had been paid the rent and taxes; and though the servant's occupation might, in law, *at the master's election*, be considered as the occupation of the master, and not of the servant, yet, *with regard to third persons*, it might be considered *either* as the occupation of the master or servant. The point was, however, reserved for the opinion of the judges, who held that the cottage *might* be described as the dwelling house of *G.*

The rule therefore deducible from these cases is, that where the servant is in the *actual* and *exclusive* occupation of a house, it is sufficient to describe the house as that of the servant in an indictment for burglary, though the *legal* occupation of the master would also have been sufficient to sustain an indictment in which the premises had been laid as the dwelling house of the latter.

Secondly, the payment of the rate, not having been made by the party himself, was not a sufficient compliance with the requisition in the twenty-seventh section of the reform act, that the party before he can be put upon the register, "shall have paid all the poor-rates which shall have become payable from him in respect of such premises" in his occupation.

The cases relating to the obtaining a settlement by being rated and paying the rates (many of which were brought before the court in *Wright* and *Stockport* (*a*))

(*a*) *Antè*, p. 33.

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are important upon this question. It is material to consider the origin of that kind of settlement. The rating and payment of rates were substituted by the 3 *W. & M. c.* 11. *s.* 6. for the notice to the parish officers of a party's having come to reside in the parish, which was required by the 1 *Jac.* 2. *c.* 17. *s.* 3. It was considered that the fact of a party's being rated by the parochial officers, would shew that they had notice of his being a resident in the parish. In this view, therefore, it was of no moment whether the party was properly rated or whether he had or had not paid the rate. [*Coltman* J. The 3 *W. & M. c.* 11. requires not only that the party "be charged with" but also that he "pay his share of" the rates.] But the principal object of the act was to make the rating equivalent to notice.

In *R.* v. *The Inhabitants of Bridgewater* (*a*) the tenant of a house, who was assessed to the land-tax, absconded, and the collector was about to distrain for the amount, when the tenant's daughter begged of him to go with her and the landlord to a neighbour who would, and who did, pay it. It was contended that this was not a payment on account of the tenant; but the court held that it must be considered as a payment by the tenant, as the money was advanced for his use, and the lender might have maintained an action against him for the amount: they therefore held that there was a sufficient payment by the tenant to gain a settlement. A debt was, in fact, created between the parties. In *R.* v. *Openshawe* (*b*), where the landlord agreed to pay all rates and taxes, and did pay them except upon one occasion, when being applied to for the poor rate he sent the collector to the tenant, desiring him to pay, and to stop it out of the rent, and the

(*a*) 3 *T. R.* 550.

(*b*) 1 *W. Bla.* 463.; *Burr. Sett. Ca.* 522.

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tenant paid it accordingly, the court held that the tenant thereby gained a settlement. Lord *Mansfield* C. J. was there of opinion, that the agreement between the tenant and the landlord was nothing to the parish. So, in *R.* v. *Oakhampton* (*a*), where a tidewaiter, who was assessed to the land tax for his salary, paid the tax, and was afterwards reimbursed by the collector, the court held that the officer gained a settlement. These cases may be relied upon by the other side, but they are readily distinguishable from the present. *R.* v. *Weobley* (*b*) was a later decision; where, in the case of an excise officer, the collector paid the tax for him, and the amount was not stopped out of his salary; and it was held that the officer did not gain a settlement, upon the ground that the payment was not made by him, either mediately or immediately. This distinction was fully recognised in *R.* v. *Axmouth* (*c*), and in the recent case of *R.* v. *South Kilvington*. (*d*)

The time at which the payment is required to be made by the twenty-seventh section of the reform act is important to be considered. The party is to pay, "on or before the 20th day of *July*" in each year, "all the poor-rates payable from him previously to the 6th day of *April* then next preceding." And the seventy-fifth section of the registration act (*e*) speaks of a party having "*bonâ fide* paid" the rates; and as both acts are *in pari materiâ*, these words may be referred to as assisting in the construction of the twenty-seventh section of the reform act.

Where premises are let to a party free of rates, it cannot properly be said that a payment of rates in respect of those premises by another party is a payment by the occupier. It may be a payment of something

(*a*) *Burr. Sett. Ca.* 5.
(*b*) 2 *East*, 68.
(*c*) 8 *East*, 383.
(*d*) 3 *G.* & *D.* 157.
(*e*) 6 & 7 *Vict. c.* 18.

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formed by him. If he did occupy in the latter capacity, it may be conceded that it would not be sufficient.

In most of the cases the party was unquestionably a servant, either domestic, menial or predial, and occupied the premises with reference to his service. In *R.* v. *Kelstern*, for example, the party was a common farm-labourer. So, in *R.* v. *Cheshunt* (which comes perhaps a little nearer to the present case), the party was also a common labourer, employed by the board of ordnance, in a gun-powder manufactory. It appeared that the board had several other houses in the parish, which they allotted to their labourers. The house therefore appears there to have been occupied for the purposes of the service. There is nothing in the statement of the present case to shew that the occupation is ancillary to the service; and the court will not carry the case further than the statement warrants, against the party's vote, and the barrister's decision. It is stated expressly that the house constituted part of the remuneration for the services of the party, and that he would have had more wages if he had not occupied the house. In *R.* v. *Bardwell* the holding of the party was expressly found by the court to be subservient to the service. But where the occupation is, as here, a part of the remuneration for services, it has been held that the party occupies in the character of tenant. As in *R.* v. *Melkridge* (*a*), where a party was permitted by several commoners to occupy a tenement as a reward for his services as a herd, it was held that such occupation conferred a settlement. The court said, that the services of the pauper were equivalent to a payment of rent; the commoners, instead of paying him so much money by way of wages, having permitted him to occupy the house. The terms of occupation are the

(*a*) 1 *T. R.* 598.

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observed, "It has been established by a series of cases, which were considered and confirmed in that of *The King* v. *Benneworth* (*a*), that it was a sufficient occupation of a tenement, if the pauper had an interest in a part of the profits of the land by perception by the mouths of his cattle. But it is essential, whether the subject of occupation be the land itself, or a part of its profits, that the pauper should have *an interest* as tenant or occupier, — a possession by mere licence without that interest is not enough. If a person were permitted by the owner of a pasture to feed his cow or sheep upon it for a time, without any valuable consideration, and without any reference to any contract between them, but by a mere act of charity or favour, no settlement would be gained by such a permissive enjoyment of the produce of the land. But if there had been a contract with the owner for a sufficient consideration, by which the pauper had a right to part of the profits of the soil to be taken by his cattle, he would have had an interest; and his occupation with that interest (if these profits were of the requisite annual value) would confer a settlement after a residence of forty days." The present case falls precisely within that principle, by merely substituting the advantage of occupying a house rent-free, for the perception of the profits of land by the mouths of cattle. The party here, occupies a house under a contract for a valuable consideration — namely his services — and he has therefore an interest in the premises.

The rule deducible from all these cases may be thus laid down: — Where the relation of master and servant exists, but the occupation of the premises of the latter is solely with a view to the better performance of the service, such occupation will not confer either a settlement under the poor laws, or a vote under the reform -

(*a*) 2 *B. & C.* 775.; 4 *D. & R.* 355.

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are several which support the latter proposition, and which are applicable to the present case. In *R.* v. *Jarvis* (*a*), the rent was paid in money; but in order to constitute the relation of landlord and tenant it is not essential that there should be such actual payment; the performance of service being a sufficient rent. Sir *William Russell* goes on to say, "And though a servant live rent-free for the purpose of his services, in a house provided for that purpose, yet if he has the exclusive possession, and it is not parcel of any premises occupied by his master, the house may be described as the house of the servant, especially if it does not belong to his master, but to some person paramount to his master." (*b*) Thus in *R.* v. *Camfield* (*c*), the tolls at a gate between *Leeds* and *Wakefield* were let to *W.*, who employed *E.* at a weekly sum to collect them, the latter living for that purpose with his family in a house belonging to the trustees, and built by them for that purpose. A burglary having been committed in the house, it was described in the indictment as the house of *E.*, and upon a case reserved, the judges were unanimously of opinion that it was rightly described, *E.* having exclusive possession; it being unconnected with any premises of *W.*'s, and *W.* not appearing to have any interest in it. That case is analogous to the present in this respect, that the lords of the admiralty here let the premises (for a service rent) to the occupier, and the Crown is paramount (*d*) to them. *Margett*'s case (*e*), cited on the other side, is a strong authority for the respondent. In all these cases the question is, whether the occupier can be turned out against his will; if he cannot, he occupies as tenant, notwithstanding the performance of services by him.

(*a*) *Ry. & Moo. C. C.* 7.

(*b*) *Russ. Crimes & Misd.* 812., 3d edit.

(*c*) *Ry. & Moo. C. C.* 42.

(*d*) *Quære*, whether this term, as used by *Russell*, is meant to include the relation in which the principal stands to his agent.

(*e*) *Leach, C. C.* 130.

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Cozens. (*a*) There is no foundation for the supposition on the other side, that the object of requiring the voter to be rated and to pay his rates was, to give him an interest in the affairs of the parish. The intention clearly was, to confer the franchise upon the party who contributes to the public burdens; and in this view it is wholly immaterial whether the tenant pays the rates with his own hands, or through the medium of another party with whom he afterwards settles the account. In *Rex* v. *Fulham* (*b*), where the tenant being assessed to the land-tax paid it and the landlord allowed him to stop it out of his rent, it was held that the tax was sufficiently paid by the tenant to enable him to gain a settlement. *Rex* v. *Chidingfold* (*c*) is to the same effect. *Regina* v. *Openshaw* and that class of cases relied upon by the other side, are authorities for the respondents. The payment in those cases was held sufficient, within the statute of *William* and *Mary*, without reference to the notice to the parochial officers. [*Maule* J. Payment by the landlord was held sufficient in those cases, even though notice was also required. *Payment* alone is required by the reform act.] *Regina* v. *Axmouth* also shews that there may be a constructive payment. In *Regina* v. *Weobly* the circumstances were very different from those of the present case. There was no arrangement between the parties in that case with regard to the payment of the rate; nor was the salary of the party, who was an excise officer, in any way reduced by the payment. Upon the authority of that case, *Regina* v. *South Kilvington* was decided; and *Regina* v. *Lower Heyford* does not appear to have been referred to.

It is clear that the seventy-fifth section of the registration act applies merely to cases where there have been

(*a*) 2 *Dougl.* 426.
(*b*) *Burr. Sett. Ca.* 488.
(*c*) *Ib.* 415.

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of an occupation without reference to any service to be performed by the occupiers; and that is the very distinction taken between their case and that of the housekeeper, whose occupation was connected with service, and who therefore was admitted not to be ratable.

Rex v. *Terrott* (*a*) it was thought would have been cited on the other side. In that case a commanding officer in barracks, having distinct apartments allotted to him, was held to be ratable to the relief of the poor for the same, he having a beneficial enjoyment of them beyond his necessary accommodation as an officer for the purpose of public service. Lord *Ellenborough* C. J. in giving the judgment of the court in that case, observed, "The principle to be collected from all the cases on the subject is, that if the party rated have the use of the building or other subject matter of the rate, as a mere servant of the Crown or of any public body, or in any other respect for the mere exercise of public duty therein, and have no beneficial occupation of, or emolument resulting from it, in any personal and private respect, then he is not ratable." *Rex* v. *Hurdis* (*b*) is to the same effect.

There is no doubt that the tender of the rate by a properly constituted agent will be sufficient to exonerate the occupier, and upon that principle alone can *Rex* v. *Cozens* be supported; there is however no such agency here. The language of the sixty-sixth section of the poor law amendment act, under which *Regina* v. *South Kilvington* was decided, is nearly identical, as to the payment of rates, with that of the twenty-seventh section of the reform act.

From some remarks which have fallen from the bench during the argument in this case, it seems to have been taken for granted that the payment of the rates by the

(*a*) 3 *East*, 506. (*b*) 3 *T. R.* 497.

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allowance is made to them by the Admiralty for rent and rates under the name of "lodging money." He (*a*) is not compelled to live in the house, but is at full liberty to reside elsewhere if he choose, but in such case, unless he did so at the request of the Admiralty, in order that they might have the house for another purpose, he would have no allowance made to him for lodging money.

In this case also the names of the parties objected to had been retained by the revising barrister.

Kinglake for the appellant.

Cockburn for the respondents.

No argument was offered in this case; it being admitted by the counsel on both sides that it stood upon the same footing as the last.

Cur. adv. vult.

The Cases of WILLIAM BROOK and Two Others were also consolidated by the revising barrister.

William Brook was clerk of the works in the engine department at *Chatham*. This case also resembled that of *James Burton* (*b*); but it was stated that *Brook* occupied a house in *Chatham Lines*, of the value of 20*l*. a year, rent free, as part remuneration for his services, by an agreement when he entered the service.

The names of the parties objected to had been retained by the revising barrister.

Kinglake, for the appellant, offered no argument, admitting that the case stood upon the same footing as *Burton*'s case.

(*a*) *Sic.* (*b*) *Antè*, 54.; *post.* 77.

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Cockburn, for the respondents, submitted that the only difference was, that in this case there was an agreement that the party should occupy the house rent-free, and that the house was not situated within the dockyard.

Cur. adv. vult.

The Cases of THOMAS SMITH and Two Others were also consolidated.

The facts of this case were also very similar to those of *James Burton*. (*a*) The case stated that *Thomas Smith* was barrack-master to *Chatham* barracks, and had the exclusive occupation of a house, rent-free, in remuneration for his services. The only difference between the two cases was, that in the present case the tenant paid the rates and taxes himself, and charged them in his account with the board of ordnance, who allowed them to him in such account.

The names of the parties objected to had been retained by the revising barrister.

Kinglake, for the appellant. The only difference between the present case and *Burton*'s is, that here the rates and taxes were paid by the party himself, though they were afterwards allowed to him in account by the ordnance. The question is, whether there has been a *bonâ fide* payment (*b*) by the party within the 6 & 7 *Vict.* *c.* 18. *s.* 75. [*Maule* J. There is no suggestion of *mala fides* in the case.] Although the money here passes through the hands of the party, there is no payment *by him*, inasmuch as the board of ordnance have agreed to pay the rate, and ultimately do so. The party does not

(*a*) *Antè*, 54.; *post*. 77. (*b*) *Vide antè*, Vol. IV. 160. 170.

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deal with the payment as one made by him on his own account, for he charges the board with it. He is merely their agent in making the payment. [*Erskine* J. referred to *Rex* v. *Openshawe* (*a*), and that class of cases (*b*) where a payment by a landlord had been held sufficient to confer a settlement on the tenant.] The law as to settlement is distinguishable in this respect. A settlement originally depended upon a residence within the parish for forty days. The settlement by payment of rates was of subsequent introduction; its object being, to shew that the party was a resident in the parish. The party here is wholly indifferent to the amount of the rate, as he does not himself bear the burthen.

Cockburn, for the respondents. The real question is, who is liable to pay the rate. It is clear that the occupier, being the party rated, is the party liable to the payment. It is of no importance from what quarter he obtains the money for the purpose of payment. If it be *given* to him, it is sufficient. He referred to *Regina* v. *Lower Heyford*. (*c*)

Kinglake, in reply. It is by no means immaterial where the party obtains the money for the purpose of paying the rate; *Regina* v. *The Mayor of Bridgenorth*. (*d*) It was there decided that a payment of rates, to entitle a party to be put upon the burgess list under the ninth section of the municipal corporation act (*e*), must be a payment by his own act; and that a payment *for him* by another person, without his authority, is not sufficient.

Cur. adv. vult.

(*a*) 1 *W. Bla.* 463., 1 *Burr. Sett. Ca.* 522.
(*b*) *Vide antè*, p. 70.
(*c*) 1 *B. & Ad.* 75., *antè*, 47.
(*d*) 10 *A. & E.* 66.; 2 *Perr. & Dav.* 317.
(*e*) 5 & 6 *W.* 4. *c.* 76.

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TINDAL C. J., now delivered judgment in the foregoing cases: —

Case of JAMES BURTON and Others.

In this case two questions were raised before the revising barrister, and were argued on the appeal to this court; first, whether the occupation by *James Burton* was an occupation as *tenant*, within the twenty-seventh section of the statute 2 *W.* 4. *c.* 45.; secondly, whether, upon the facts stated, he had paid the poor-rates, as required by the proviso in that section.

As to the first question, the facts are, that the house occupied by the claimant is situated in the dockyard at *Chatham*; that the claimant is master rope-maker, and, as such, had the house as his residence; that he paid no rent in money for it, but had it in part remuneration for his services, and that no part of it was used for public purposes, the office in which he performed his public services being away from it. If he had not been allowed the house, he would have had an allowance for a house in addition to his salary.

Upon this state of facts the revising barrister has found that the claimant occupied as tenant; and the question in effect is, whether the statement of facts shews that the decision is wrong; that is, whether it shews the occupation not to have been in the character of tenant.

On the argument, several cases were cited, bearing on the question whether the house could be called the dwelling-house of the claimant in an indictment for burglary. But that question is so different from the one now in dispute, viz. whether there was a *tenancy* or not (*a*), that we think it unnecessary to notice those decisions.

But the cases chiefly relied on were those settlement cases in which the question has arisen, whether a servant came to settle on a tenement belonging to his master

(*a*) The words of the twenty-seventh section are "who shall occupy as (owner or) tenant."

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within the meaning of the statute 13 & 14 *Car.* 2. *c.* 12 The language and object of that act are very differer from those of the statute now under consideration; and therefore, no similarity of facts in a case arising on th one act can make it in point upon a question raised o the other. But as the court, in deciding those case has considered that the settlement turned on the ques tion, whether the pauper *occupied as tenant* to his maste the decisions are very important on the present inquiry.

In those cases, as in this, there was no doubt of th right to exact, and the liability to render, service; bu in those, as in the present case, the doubt was, whethe the relation of landlord and tenant subsisted between th same parties. There is no inconsistency in the relation c master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an in terest in real property, either in fee, for years, at will or for any other estate or interest; and if he do so, th servant then becomes entitled to the legal incidents of th estate as much as if it were purchased for any othe consideration.

But it may be, that a servant may occupy a tenemen of his master's, not by way of payment for his services but for the purpose of performing them; it may be tha he is not *permitted* to occupy, as a reward, in the perfor mance of his master's contract to pay him, but *require* to occupy in the performance of his contract to serve hi master. The settlement cases, cited in argument, esta blished, and proceeded on, this distinction. We think it applicable to the present question; and as there i nothing in the facts stated, to shew that the claimant wa *required* to occupy the house for the performance of hi services, or did occupy it *in order to* their performance or that it was *conducive* to that purpose more than any house which he might have paid for in any other way than by his services; and, as the case expressly finds that he had the house as part remuneration for his ser-

vices, we cannot say that the conclusion at which the revising barrister has arrived is wrong.

The case, indeed, stated that the claimant was master rope-maker, and *as such* had the house as his residence; but that expression is equally applicable, whether he was made tenant of the house in payment of his services as master rope-maker, or occupied it for the purpose of performing them.

The fact also of having a lower salary in consequence of being allowed a house, though not immaterial, is by no means decisive; for such a fact might exist in a case in which the house was occupied for the purpose of the service, and not in the character of tenant. It may well happen that something *in the service* which renders it less onerous or more pleasant may cause a reduction of the salary, without being a part of the salary itself. A master may give lower wages in consequence of lodging his servants in his house, instead of requiring them to find lodgings out of it, without making them his tenants. But in the present case, upon the grounds above stated, we think the juster inference is, that there is an occupation as tenant.

On the second question, it appears that the claimant was rated to the poor-rates and assessed taxes, and that they were paid for him in part remuneration of his services. Upon this question it appears to us that the payment, being one to which the claimant was liable, and having been made on his own account by those whom he procured to make it, by giving value for it, is sufficient within the twenty-seventh section of the statute. Whether it would or would not have been sufficient within the 3 *W. & M. c.* 11. *s.* 6., in which rating and payment are made to confer a settlement, by way of substitution or equivalent for notice to the parish; or under 4 & 5 *W.* 4. *c.* 76. *s.* 66., — where the payment, being for a similar purpose (that of conferring a settlement) with

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that in the 3 *W. & M.*, may perhaps require to be made in a similar manner,—is a different question from that before us. The present question arising upon an act of parliament conferring a franchise in respect of property or ability, we think the payment, having been made in a manner equally indicative of these qualifications, is as effectual, within the spirit of the enactment, as if made by the hand of the claimant. The words of the act which require that "*such person* shall have paid the rate," do certainly, in their largest ordinary sense, comprehend payments made in discharge of, and *procured* by, such persons, as well as those made by his own hand: and the largest ordinary sense is that in which words ought to be construed, where there is nothing in the occasion on which they are used, or in the context, to restrict them.

We think therefore the decision of the revising barrister is right on both points.

Decision affirmed.

Case of C. A. PARKER and Five Others.

This case does not materially differ from that of the vote of *James Burton*, and the decision of the revising barrister must be affirmed, on the grounds stated in giving judgment in that case.

Decision affirmed.

Case of W. BROOK and Two Others.

There is no substantial difference between this case and that of *James Burton;* the decision of the revising barrister must therefore be affirmed.

Decision affirmed.

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Case of THOMAS SMITH and two others.

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IN this case also we think the decision of the revising barrister must be affirmed, on the grounds stated in the judgment in the case of *James Burton's* vote. The rate being paid by the voter's own hand is a circumstance not unfavourable to the vote; but we think it makes no substantial difference either way.

Decision affirmed. (*a*)

(*a*) And see *Rex* v. *Iken*, 2 *A. & E.* 147.; 4 *N. & M.* 117.

Borough of LEWES.

ALFRED PLAYSTED BARTLETT, Appellant, and JOHN GIBBS, Respondent.

Dec. 6.

THE name of the appellant was inserted in the list of persons entitled to vote in the election of members for the borough of *Lewes*, in respect of property occupied within the parish of *All Saints*, as follows:

Christian Name and Surname.	Place of Abode.	Nature of Qualification.	Name of the Street where Situate, &c.
Bartlett, Alfred Playsted	East Street.	House.	East Street.

A party whose qualification consists in the occupation of several premises in immediate succession (under the 2 *W.* 4. *c.* 45. *s.* 28.), ought to be registered in respect of all such premises.

If a party so qualified is registered only in respect of the

It was proved at the revision that the appellant had occupied, as tenant, a house, No. 10, *East Street*, in the parish of *All Saints*, within the said borough, since (from) the 25th of *December*, 1842: that he had, for consider-

premises in his occupation at the time of making out the list of voters, it is such a misdescription of his qualification as the revising barrister has no power to correct under the 6 & 7 *Vict.* *c.* 18. *s.* 40.

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ably more than six months previously, occupied also, a tenant, a house, No. 16, *West Street*, in the parish of S. *John*, within the said borough; that he had remove from the latter to the former house immediately, witho any interval of time; that each house was of more tha the value of 10*l.* per annum; that he had been rated i respect of both houses to all rates made during the p riod of his occupation of them; and that all the rat and assessed taxes due from him in respect of them ha been duly paid within the time limited by 6 & 7 *Vic c.* 18. *s.* 75. (*a*)

The case then stated, that an objection was taken th the appellant's qualification consisting not of one hous No. 10, *East Street*, but of two houses, No. 16, *West Stree* and No. 10, *East Street*, occupied by him in immedia succession, the description of his qualification in the li should have corresponded with this fact, and that h ought to have been registered for both the houses whi constituted his qualification; that the revising barrist decided that where a person founds his qualification up different premises occupied by him in immediate succe sion, conformably to the provisions of the 28th sect. 2 *W.* 4. *c.* 45., it is required that he should be regi tered in respect of all those several premises, and th they should be specifically set forth in the description his qualification; and that the appellant being register for one only of the houses occupied by him, and th house having been occupied by him only for a period six months, he had not proved that he was entitled have his name retained in the list of voters in respect the qualification described in the list; that an add tional objection was taken that there was an insufficie or inaccurate description of the appellant's qualificatio which the revising barrister had power (*b*) to corre

(*a*) Reciting 2 *W.* 4. *c.* 45. *s.* 27. (*b*) *Quære*, no *power*.

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under the provisions of the 40th sect. of 6 & 7 *Vict. c.* 18. That the revising barrister decided that where a party was objected to, he the revising barrister had no such power, but that he was bound, by one of the provisions of the same section, to require such party to prove that he was entitled to have his name inserted in the list of voters in respect of the qualification described in such list; and that the appellant having, in the judgment of the revising barrister, failed to do so, he accordingly expunged the name of the appellant from the abovementioned list of persons entitled to vote for the borough of *Lewes.*

The case then proceeded as follows:

The question for the opinion of the court is, whether, under the circumstances mentioned in the above statement of facts, the name of the appellant was rightly expunged from the said list of voters.

If the court shall be of that opinion, the said list is to stand without amendment: if the court shall be of a contrary opinion, then the said list is to be amended by inserting therein the name of the appellant.

(Signed) *R. R*———.
One of the Revising Barristers
for the Borough of *Lewes.*

The case was argued in last *Michaelmas Term* (*a*) by *Creasy* for the appellant. The points for consideration are; first, whether, in a case of successive occupation, *all* the premises successively occupied must be stated as constituting the qualification of the voter; and, secondly, supposing such statement necessary, whether the revising barrister had power to amend the list, — in which the premises, in the actual occupation of the party objected to, are alone stated, — by inserting the premises previously occupied by him.

(*a*) *November* 20th.

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It is contended, on the part of the appellant, that it is not necessary that all the premises should be inserted in the list; but, that if it be so, then the revising barrister has the power to make the insertion.

There is a fallacy in that part of the case which states that a person "founds his qualification upon different premises occupied by him in immediate succession." The *qualification*, it is submitted, is founded on the occupation of a house of the annual value of 10*l*. By the twenty-seventh section of the reform act, the right of voting is conferred on the occupier of any house, &c. of that value, if he is duly registered according to the provisions thereinafter contained. Three conditions are imposed, which must be complied with before the party becomes entitled to be put upon the register; first, that the party shall have occupied the premises for twelve months previously to the last day of *July*; secondly, that he shall have been rated to all the poor-rates made during the year of his occupation, and shall have paid the rates and assessed taxes due from him, by a certain time; and, thirdly, that he shall have resided for six months in the borough, or within seven miles thereof. Unless those conditions are complied with a party, it is true, cannot be registered; but they form no part of, and are quite distinct from, the qualification itself. The twenty-eighth section provides for the case of successive occupation; by that section it is enacted that the premises in respect of the occupation of which the party is entitled to be registered, need not be the same, but may be different premises, provided they have been occupied in immediate succession during the twelve calendar months, and the rates have been duly paid in respect of all of them. The successive occupation of different premises is therefore equivalent to, or a substitute for, the continuous occupation of the same premises. It is clearly not requisite that it should appear on the register

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that the claim to vote is in respect of the continuous occupation of the same premises for twelve months; neither is it necessary that the successive occupation of different premises should be stated.

In the present case, the ground upon which the party rested his qualification, viz., the occupation of a house in *East Street*, did appear in the list.

The meaning of the sections in the reform act and registration act may be explained by the forms given in the schedules to the acts; and these forms correspond with the list in this case. The form in schedule (I.) to the reform act, No. 1., is more full than the corresponding form in schedule (B.), No. 3. to the registration act; but, in both instances, the examples are given in the singular number only, such as "house, "warehouse," &c., or "street," "lane," &c. [*Tindal* C. J. Probably the reason for inserting the premises in the list, is, to enable other parties to ascertain whether they are of sufficient value. Would not the reason be the same, or even stronger, for inserting the premises which had been *previously* occupied by the voter?] That is, perhaps, the only argument which can be suggested in support of the view of the case which has been taken by the revising barrister: and that is at best merely an argument *ab inconvenienti*. [*Maule* J. The notice of claim given in schedule (I.) to the reform act, No. 4. is also in the singular number.]

The overseers of the parish in which the premises are situated are the parties required to make out the lists. They have no means of ascertaining what premises a party may have previously occupied in another parish. They are without the means of obtaining the necessary information; nor is it any part of their duty to seek it. The overseers are not required to publish the name of every person who *has occupied* premises in their parish. [*Coltman* J. By the thirteenth section of the registra-

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tion act, the list which the overseers are to make ou is, of persons entitled to vote in respect of premis "situate wholly *or in part*" within their parish.] Th expression has reference only to the local descriptio of the premises.

The fifty-eighth section of the reform act furnish a strong argument. Under that section three questio were required to be asked of the voter at the time the election. The third was, "Have you the sam qualification for which your name was originally inserte in the register of voters, now in force for the city, & (*specifying in each case the particulars of the qualificatio as described in the register*)." To entitle a party to vo he must, at the time of the election, have been able to stat that he was in the occupation of the *same premises* a those for which his name was inserted in the register. his name might have been inserted for two or more hous occupied successively during the year, he would hav been in the occupation of only the last house, at th time of the election. It is true, that under the ne law (*a*), this third question is no longer to be asked at th poll. The old law, however, remains in force, so far relates to the description of the premises in the registe

Secondly, it is submitted that, at all events, the r vising barrister had the power, under the fortieth se tion of the registration act (*b*), to correct the list b

(*a*) See 6 & 7 *Vict. c.* 18. *ss.* 79, 80, 81.

(*b*) Enacting "That the revising barrister shall correct any mistake which shall be proved to him to have been made in any list, and shall expunge the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote, and also the name of every person who shall be proved to him to be dead; and *wherever* the christi name, or the place of abode, *the nature of the qualificatio* or the local or other descripti of the property of any pers who shall be included in a such list, and the name of t occupying tenant thereof, *sh be wholly omitted* in any ca where the same is by this a directed to be specified therei *or* if any person whose name included in any such list, or h

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inserting the different premises successively occupied by the voter. In the barrister's construction of that section, he appears to have considered that he could only remedy those errors in the list of voters which should have been discovered by himself; but that as to those which had been discovered and pointed out as grounds of objection by other parties, he had no power of amend-

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place of abode, or the nature or description of his qualification, shall, in the judgment of the revising barrister, *be insufficiently described* for the purpose of being identified, such barrister *shall expunge* the name of every such person from such list, *unless the matter or matters so omitted or insufficiently described, be supplied* to the satisfaction of such barrister before he shall have completed the revision of such list, in which case he shall then and there insert the same in such list: Provided always, that, whether any person shall have been objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters or claim, as the case may be; nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same; and where the name of any person inserted in any list of voters, shall have been objected to by the overseers, or by any other person, and such other person so objecting shall appear by himself, or by some one on his behalf, in support of such objection, and shall prove that he gave the notice or notices respectively required by this act to be given by him, every such barrister shall then require it to be proved that the person so objected to was entitled, on the last day of *July* then next preceding, to have his name inserted in the list of voters *in respect of the qualification described in such list;* and in case the same shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was then incapacitated by any law or statute from voting in the election of members to serve in parliament, such barrister shall expunge the name of every such person from the said lists: provided always, that where any person whose name appears on any list of voters for any *county* shall be objected to on the ground of having changed his place of abode without having sent in a fresh notice of claim, it shall be lawful for the barrister, on revising the list, to retain the name of such person on the list of voters, provided that such person or some one in his behalf, shall prove that he possessed, on the last day of *July*, the same qualification in respect of which his name has been inserted in such list, and shall also supply his true place of abode, which the said barrister shall insert in such list."

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ment. This could not, however, have been the inter tion of the act.

It cannot be disputed that the party, whose case i under consideration, was legally entitled to vote, pr vided he were properly registered; and surely his tit cannot be invalidated merely by the overseers omittin by mistake to insert the whole of his qualification i their list of voters. Under the forty-section the revisin barrister may supply an omission of a party's christia name, or of the qualification, if furnished with sati factory materials for doing so before the revision completed. In the present case, the omission is of pa only of the qualification; and surely he may supply part, if it is competent to him to supply the *whole*, the qualification. He cannot insert a different quali cation; but that is not asked for here. Neither ca the power of the revising barrister to amend be limite by the circumstance of another party having made a objection. [*Coltman* J. You do not rely on the la provision of the fortieth section.] That appears to a ply only to county voters.

R. C. Hildyard for the respondent. The revisin barrister has decided in this case consistently with t manifest intention of the legislature, expressed by t words of the act.

It is suggested on the other side, that the right vote being in respect of a twelve months' occupation of 10*l.* house, it would be equally necessary to state t fact of a twelve months' occupation as a part of t qualification. The legislature, however, has point out the degree of particularity required in describi the qualification. The schedules to the reform a contain no mention of any period of *occupation*, but th do furnish the form of statement of the *premises* in r spect of which the party claims to vote. And this di

tinction is a reasonable one; for it would convey no information to state that the premises had been occupied for twelve months. (*a*) Under the twenty-seventh section they must have been so occupied to entitle the party to be put upon the register at all. This is the case also with respect to being rated, the payment of rates, and the six months' residence. All these facts must exist to entitle a party to be put on the register; but they are not required to be stated in the register. The schedules comprise but a small portion of the ingredients of the qualification. They do not mention "a house and land," which may be joined together in certain cases, in order to confer the franchise; nor do they mention any "other building," besides those which are especially enumerated in the act. No argument can be deduced from the scantiness of the schedules, to justify the omission of the various premises occupied in succession. Stress has been laid upon the heading of the column being in the singular number, such as "street," "lane," &c. It speaks also of "this parish," in the singular; but in the case of a house and land, the house may be in one parish and the land in another.

In such cases there would exist a sufficient qualification; but it must be correctly described. (*b*) In the interpretation clause to the registration act (*c*) it is declared, that "where the subject or context requires it, every word importing the singular number only, shall extend and be applied to several persons and

(*a*) *If* all the premises held in succession *must* be mentioned, the insertion of one house only would imply that a twelvemonth's occupation of that house was relied on.

(*b*) Where the house was in parish *A.* and the land in parish *B.*, there would not appear to be any obligation on the overseers of either parish to insert the name of the party in the list of voters, inasmuch as the party would not have a perfect qualification in either parish. It seems to follow from the decision in the principal case that a party so situated would be driven to make his claim.

(*c*) 6 & 7 *Vict. c.* 18. *s.* 101.

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things as well as one person or thing." The schedules therefore, cannot be considered as limited to the singular number. It was one of the principal objects of the reform act, as stated in the preamble, "to diminish the expense of elections" by shortening the period of their duration; and, with this view, the discussion of the claims of parties to vote was fixed to take place at the time of the revision instead of the time of election; and ample time is allowed to parties to sift and test such claims. But there would be no advantage in this, if a party might be put upon the list for a qualification in respect of which he was not entitled to vote. He would appear to be on the list for a good and valid qualification. An objector might know that the qualification was insufficient; but before the barrister, the voter might set up a supplemental qualification, which the objector would have no means of testing.

With regard to the power of the revising barrister to amend the list it is to be observed, that the fortieth section of the registration act (*a*) differs from the corresponding section of the reform act.(*b*) The registration act draws a distinction between cases where there is an objection to a party and where there is not. The party objected to must prove his right to vote in respect of the particular qualification inserted in the list. The revising barrister cannot alter that qualification. When the qualification is stated to be in respect of a house only, the barrister has no power to add land to it; for that would be to alter the nature of the qualification. So, in the present case he cannot add other premises to those stated in the list. It is urged that in the case of a successive occupation of different premises, it will be difficult for the overseers to ascertain what premises the party has occupied; there is however no such difficulty

(*a*) 6 & 7 *Vict. c.* 18. (*b*) 2 *W.* 4. *c.* 45. *s.* 50.

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for where the name of the party is not inserted at all, or is inserted with an insufficient qualification, he may claim to have his name and qualification properly inserted, under the fifteenth section of the registration act, by which the forty-seventh section of the reform act is superseded. The object of these provisions as to making out the lists of persons claiming to vote, is, to facilitate their identification; but this object would be in a great measure frustrated by the adoption of the argument on the other side. If the decision of the revising barrister is upheld, it will in no way affect the franchise; it will merely point out the course to be adopted in the registration hereafter.

But if the court should hold that the insertion of all the premises successively occupied is not necessary; or that the omission may be supplied by the barrister at the time of the revision, questions of great difficulty may arise as to whether it will be necessary to add to a house, an adjoining garden, or field, or land situated in another part of the borough, but constituting part of the qualification, or whether such addition may be made by the barrister.

Creasy, in reply. The claim to vote arises here under the twenty-seventh section of the reform act; and the twenty-eighth section merely states that the premises in respect of which a party claims to vote may be different premises, provided they have been occupied in immediate succession for a period of twelve months, such successive occupation being an equivalent for the continuous occupation of the same premises for that period.

The twenty-ninth section, which relates to the *joint* occupation of the same premises by different parties, supports this view of the case. It is not necessary that such joint occupation should be stated in the list. The case of the occupation of a house in one parish and of

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land in another, is provided for by the thirteenth section of the registration act; for the overseers are required to make out a list of persons entitled to vote in respect of premises "situate wholly or in part" within their parish. The fifteenth section of that act is in favour of the appellant; the claimant is thereby required to give notice of his claim according to the form in the schedule, which, as before noticed, does not apply to a case of successive occupation. [*Erskine* J. There is a difference in the form of the notice of claim given in the schedules to the reform and registration acts. In the former the form states, that "My qualification consists of a house in *Duke Street in your parish;*" and in the latter it states "that the particulars of my qualification and place of abode are stated in the columns below," and the fourth column is headed "Street, &c. in the parish, &c. where the property *is situate*," &c.] The schedules, it is submitted, must be read in conjunction with the sections that refer to them.

As to the power of amendment by the revising barrister, that is only limited, by the fortieth section, as to the *nature* of the qualification; but that is not the amendment required in this case.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

In this case the name of the appellant had been inserted in the list of persons entitled to vote in the election of members for the borough of *Lewes*, in respect of property occupied within the parish of *All Saints*. And the appellant's qualification, described in the list, was a house in *East Street*. An objection having been made to the appellant's name, he was required, by the revising barrister, to prove that he was entitled to have his name inserted in such list, in respect of the qualification therein

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described. And the case states that it was proved that the appellant had occupied, as tenant, a house, No. 10, *East Street*, in the parish of *All Saints*, within the borough, since the 25th of *December* 1842; and that he had removed into that house immediately, and without any interval of time, from another house, situate in *West Street*, in the parish of *St. John*, within the said borough, which he had occupied as tenant for considerably more than six months previously to his removal, and that each of those houses was of the clear yearly value of more than ten pounds.

It was objected, that upon this evidence it appeared that the appellant's qualification consisted of the occupation by him of the *two* houses in immediate succession, and not merely of the house in *East Street*, described in the list, and it was therefore contended that his name should be expunged from the list. It was answered by the appellant, that his qualification was correctly described; and that, even if it were not, the description might be amended by the revising barrister under the provisions of the stat. 6 & 7 *Vict. c.* 18. *s.* 40. (*a*) The revising barrister decided that it had not been proved that the appellant was entitled to have his name inserted in the list of voters in respect of the qualification described in such list; and that he had no power to make the amendment suggested by the appellant; and thereupon he expunged the name of the appellant from the list.

The question submitted to the opinion of this court is, whether, under the circumstances stated in the case, the name of the appellant was rightly expunged from the list; and we think that it was.

By the statute 6 & 7 *Vict. c.* 18. *s.* 40. (*a*), it is enacted, that whether any person shall be objected to or not, no evidence shall be given of any other qualification than

(*a*) *Suprà*, p. 86. n.

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that which is described in the *list* of voters, or *claim*; and that where the name of any person inserted in any list of voters shall have been objected to, and notice of the objection given, the revising barrister shall require it to be proved that the person so objected to, was entitled, on the last day of *July* then next preceding, to have his name inserted in the list of voters in respect of the qualification described in such list; and in case the same shall not be proved to the satisfaction of such barrister he shall expunge the name of such person from the list. The question, therefore, is, whether the appellant was entitled to have his name inserted in the list, in respect of his occupation of the house in *East Street*, without any evidence of any other qualification; or, in other words, whether his qualification to vote consisted of his occupation of the house in *East Street*, *or* of his occupation in immediate succession of the two houses described in the case.

By the stat. 2 *W.* 4. *c.* 45. *s.* 27., it is enacted, "that every male person of full age, and not subject to any legal incapacity, who shall occupy within the borough, as owner or tenant, any house of the clear yearly value of not less than ten pounds, shall, if duly registered according to the provisons hereinafter contained, be entitled to vote in the election of members to serve in parliament for such borough." Now, if the clause had stopped here, the occupation by the appellant of the house in *East Street* would have entitled him to vote. But the section proceeds, "Provided always, that no such person shall be so registered in any year unless he shall have occupied such premises as aforesaid, for *twelve calendar months* next previous to the last day of *July* in such year." Under this section, therefore, the appellant would not be entitled to have his name inserted in the list of voters in respect of his occupation of the house in *East Street*; for he had not occupied that house for twelve calendar

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months. But by section 28., it is enacted, that the premises in respect of the occupation of which any person shall be entitled to be registered in any year, and to vote in the election for any borough as aforesaid, shall not be required to be the same premises, but may be different premises occupied in immediate succession by such person during the twelve calendar months next previous to the last day of *July* in such year.

Under this section the appellant was clearly entitled to have his name inserted in the list of voters; and the first question is, whether he was entitled to have it inserted in respect of his occupation of the house in *East Street* alone, or whether his occupation of the house in *West Street* formed a part of his qualification, and ought to have been described in the list.

On the part of the appellant it was insisted that the right to vote for a borough was given to the occupier of premises of the description and value mentioned in the early part of the twenty-seventh section, without reference to the duration of his occupation, provided the occupier's name and qualification were duly registered: and that, although by the proviso added to that section, and by the enactments of the twenty-eighth section, a condition precedent to the registration of such occupier's name and qualification, was introduced — that he should have occupied, for twelve calendar months, either the premises in respect of which he claimed a right to vote, or those premises and some other similar premises within the borough, in immediate succession — yet that the premises in respect of which he was entitled to vote, and therefore the premises to be described as his qualification, were the premises occupied by him on the last day of *July*. And it was urged that this view of the case was confirmed by the circumstance, that it is not required that the period of the occupation should be stated in the list; and that the forms prescribed in the schedule are

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not adapted to the description of any other premises than those in the occupation of the voter at the time of the registration, especially where the earlier occupation was of premises in some other parish.

But we think that the decision of this question ought not to depend upon a critical examination of the forms in the schedule, which are inserted merely as examples, and are only to be followed implicitly, so far as the circumstances of each case may admit. And looking at the whole scope and object of the different enactments relevant to this question, we consider that the appellant's title to have his name inserted in the list of voters, rested upon his occupation of the *two* houses in immediate succession, and that he ought to have been registered for both those houses, the occupation of which in succession constituted his qualification to vote; for we think that the legislature intended that the registration list should afford such information of the nature and situation of the premises, in respect of the occupation of which each person claimed a right to vote, as would enable the other voters to ascertain, by inquiry, the sufficiency of the occupation and value of each of the premises. And it is obvious that for such a purpose, in cases of successive occupation, the description of the premises formerly occupied by the claimant would be, at least, *as* necessary as the description of the premises still in his occupation; for without such information it might be difficult to prevent surprise and fraud on the one hand, or to avoid groundless opposition on the other. And we think the language of the fortieth section of the statute 6 & 7 *Vict. c.* 18., and of the twenty-eighth section of the statute 2 *W.* 4. *c.* 45. sufficiently explicit to carry this intention into effect. We are therefore of opinion that a description of all the premises occupied in succession during the twelve calendar months should be inserted in the list as forming the voter's qualification.

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And as the whole object of the notice would be defeated if the omission of any part of such qualification could be remedied at the court of revision, we are also of opinion that the addition of the premises in *John Street* to the qualification inserted in the list, would have been a change in the description of the qualification not warranted by the provisions of the fortieth section, and that the revising barrister was right in refusing to make such alteration, and in expunging the name of the appellant from the list.

Decision affirmed. (*a*)

(*a*) The fortieth section (*supra*, 86. (*b*)) relates to two classes of defects only. The first class consists of cases in which there is *a total omission* of "the christian name, *or the nature of the qualification*, or the local or other description of the property." Here, the omission of "the nature of the qualification" was not total. The second class embraces cases of *insufficiency* of description "for the purpose of being identified." Here, the description, such as it is, was sufficient for the purpose of identification. The defect was, not *total omission* or *misdescription*, either of which might have been amended; it was a case of *partial omission*, which is unamendable.

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Borough of BRADFORD.

April 30.

COOPER, Appellant; COATES, Respondent.

Practice as to delivery of paper-books.

The duties of a post-master in receiving and forwarding notices of objection under the registration act, are merely ministerial, and may, in his absence, be performed by a clerk.

THIS was a consolidated appeal. When the case wa called on for argument (*a*), *Tindal* C. J. remarke that no paper-books had been delivered to the judges and stated that a similar practice must be observed i regard to these appeals, as in special cases; viz., that th appellant must deliver copies of the case to the two senio judges, and the respondent, to the two junior judges.

The case, the facts of which are stated below, therefor stood over for some days, when it was argued by *Bompa* Serjt. for the appellant, and *J. L. Adolphus* for the re spondent.

Robert Waterhouse, whose name was inserted in th list of voters for the borough of *Bradford* in the count of *York*, objected to the name of *William Allan* bein retained in the list of voters for the said borough, as n having been entitled, on the 31st day of *July* 1843, t have his name inserted in any list of voters for the sam borough in respect of a house alleged to be occupied b him at *Westgrove Street*, in the town of *Bradford*.

On behalf of the objector it was shewn that all th requisitions of the 6 & 7 *Vict. c.* 18. *s.* 17. as to th delivery of the proper notice to the overseers had bee complied with, and all the directions of sect. 100. of th same act (*b*) were also proved to have been strictly a

(*a*) *Monday, November* 13th.

(*b*) 6 & 7 *Vict. c.* 18. *s.* 100. enacts "that it shall be sufficient in every case of notice to any person objected to in any list of county, city or borough voters, and in the livery of the city of *London*, and also, in the case county voters, to the occupyi tenant whose name and place abode appears in such respecti list as aforesaid, if the noti so required to be given as afor said, shall be sent by the po

hered to, except that the notice directed to the party whose name was objected to was delivered open and in duplicate to the postmaster's managing clerk, instead of the postmaster himself, who was proved to have been absent from *Bradford* at the time such notice was delivered; and that the duties as to comparing the notice with the duplicate, and stamping and returning the latter to the party bringing the same, were performed by the managing clerk, and not by the postmaster himself. On the production of the stamped duplicate by the party

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free of postage, or the sum chargeable as postage for the same being first paid, directed to the person to whom the same shall be sent, at his place of abode as described in the said list of voters; and whenever any person shall be desirous of sending any such notice of objection by the post, he shall deliver the same, duly directed, open and in duplicate to the *postmaster* of any post-office where money-orders are received or paid, within such hours as shall have been previously given notice of at such post-office, and under such regulations with respect to the registration of such letters, and the fee to be paid for such registration (which fee shall in no case exceed two-pence over and above the ordinary rate of postage), as shall from time to time be made by the postmaster-general in that behalf; and in all cases in which such fee shall have been duly paid, the *postmaster* shall compare the said notice and the duplicate, and, on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office; and the production by the party who posted such notice of such stamped duplicate shall be *evidence* (as to which, *vide post*, 103.) of the notice having been given to the person, at the place mentioned in such duplicate, on the day on which such notice would in the ordinary course of post have been delivered to such place: provided also, that if no place of abode of the person objected to shall be described in the said list, or if such place of abode shall be situate out of the United Kingdom, then it shall be sufficient if notice shall be given to the said overseers, and to such occupying tenant as aforesaid (if any) in the case of a county voter, or, in the case of a city or borough voter, to the overseers or to the town clerk, or in the case of a liveryman of the city of *London*, to the secondaries and clerk of the particular company to which the person objected to shall belong, as in each of the cases hereinbefore required."

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who posted such notice, the barrister decided that this was evidence of the notice having been given to the person, at the place mentioned in such duplicate, on the day on which such notice would, in the ordinary course of post, have been delivered at such place. The agent for the party objected to contended that the notice should have been delivered to, and examined by, the postmaster himself; and thereupon the party objected to having declined to attempt to substantiate his right to be retained in the list of voters, the barrister expunged his name from such list.

(Signed) *E. E. D—*, Revising Barrister.

The case then stated that *Cooper* (the appellant) who was an attorney-at-law, on behalf of the above-named *William Allan*, and also on behalf of all the other persons interested, as appellants, in this matter, appealed from the above decision.

(Then followed the names of twenty-eight other parties.)

And that *Coates* (the respondent), on behalf of *Robert Waterhouse*, agreed to appear and answer the appeal.

Bompas Serjt. for the appellant. (*a*) The question depends upon the construction of the 100th section of the registration act (*b*), whereby an objector is empowered to send a notice of his objection, by post, to the party objected to; but it is required that the notice so sent, shall be delivered open, and in duplicate, to the *postmaster* of any post-office where money-orders are received or paid, within certain hours to be notified. The postmaster is to compare the notice and the duplicate; and on being satisfied that they are alike in their address

(*a*) *Thursday, November* 16th. (*b*) *Suprà*, p. 98. *n.*

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and contents, he is to forward one of them to its address by post, and to return the other duplicate, duly stamped, to the party who brings it. The question therefore is, whether these duties are imposed on the postmaster himself, or whether they may be performed by any clerk in the post-office. The objector is not *compelled* to post the notice of objection. He may resort to the mode of service pointed out in sect. 17., and either personally serve the notice on the party objected to, or leave it at his place of abode. It is an important protection to the party who has to exercise the franchise, that the notice of objection should be properly served; a wrong would be done to him if his name were improperly struck off the list. The intention of the legislature was, to ensure the receipt of the notice by him. With this view they have fixed upon the postmaster as the person who is to receive and compare the notices of objection that are to be transmitted by post. But it is not *every* postmaster who is competent to perform these duties. The legislature has specially fixed upon the master of a post-office where money orders are received and paid. (*a*) This shews that he must be a responsible party. His duties are not merely ministerial; he has to compare the notices, to see that the addresses are correct, and to take care that one notice is actually sent by post. He is in fact to exercise his discretion and judgment. The production of the stamped duplicate is not the only evidence of the notice having been sent; for the 100th section requires that such production shall be "by the party who posted such notice." He may therefore be examined as a witness. If the clerk who performed the duties in this instance might lawfully do so, any other clerk would be equally competent. The clerk here is not even a deputy postmaster; nor does it even

(*a*) See 3 & 4 *Vict. c.* 96. *s.* 38

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appear that he was specially appointed to perform the duties of postmaster. The absence of the principal is no answer to the objection, as certain hours, within which the notices are to be delivered, are to be specially fixed by the postmaster-general. [*Maule* J. If the provisions of the section apply to the principal office in *London*, is it requisite that the postmaster-general should be there to receive the notices?] It is not necessary that the party should post the notices at the principal office. [*Maule* J. But suppose he does post them at that office, there being nothing in the section to prevent him from so doing.] There may be a postmaster at that office. If not, the objector could not post the notices there under this section.

In the interpretation clause (*a*) various instances are given of clerks or officers to whose deputies or representatives the provisions of the act are declared to apply: thus the words "clerk of the peace" "shall comprehend and apply to any deputy, or other person exercising the duties, of such clerk of the peace." There are similar provisions as to a town-clerk and overseers; but no mention is made of a postmaster. The inference from this strengthens the argument that he cannot act by deputy but that he must himself be satisfied that the copy which is to be posted is correct. [*Maule* J. That does not seem inconsistent with the duty being merely ministerial.] The duty depends upon an exercise of judgment, and is therefore, at least, *quasi* judicial. If a mere obedience to written directions were all that was required that would be a ministerial duty. [*Maule* J. The case of a post-office being kept by a *postmistress* does not appear to be provided for.] In such a case the masculine gender would probably be considered to include the feminine; but if not, the consequence would merely be

(*a*) Sect. 101.

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that the party could not post the notices at that particular office, but must either serve them, under the 17th section, or post them at some other office where there was a postmaster. An additional reason why the postmaster may have been considered the proper party to be selected for this office is, that he is precluded from voting at an election; but a *clerk* in the office is not disqualified.

J. L. Adolphus for the respondent. As to the last observation, the stat. 22 *Geo.* 3. *c.* 41., enacts that no "postmaster, postmaster-general or his or their deputy or deputies, *or any person employed* by or under him or them, in receiving, collecting or managing the revenue of the post-office, or any part thereof, &c., shall be capable of giving his vote" at any election. Every person therefore employed as "managing clerk" in a post-office would be disqualified. (*a*)

But it was not competent to the revising barrister to entertain the question as to the sufficiency of the posting. By the 100th section the production of the stamped duplicate is made statutable evidence of the notice having been given to the party objected to. The section says that "the production by the party who posted such notice of such stamped duplicate, shall be *evidence* (*b*) of the notice having been given to the person at the place mentioned in such duplicate," &c. [*Tindal* C. J. The *postmaster* is required to return the stamped duplicate to the party who brings the notices.] But the postmaster is not required to stamp the duplicate himself. He is to return the duplicate "duly stamped with the stamp of the said post-office;" and the words "*such* stamped duplicate" in the next sentence must refer to the condition previously

(*a*) See *M'Symon's* case, Glasgow, 1 *Peckw.* 352.

(*b*) *Antè*, 99. *n.* It is not said that it shall be *conclusive.*

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mentioned, viz., that the duplicate must be duly stamped. The production of such stamped duplicate is all that the barrister can require as proof that the party objected to has received the notice. The case here states that all the directions were observed, except that the notice was delivered to the clerk, and that he performed the functions of comparing, stamping and returning the duplicate. It is not said that the objecting party knew that all the requisite functions were not performed by the postmaster. It was not intended by the act to let in inquiries before the revising barrister as to the proceedings in the post-office, or as to the title of the postmaster or his agent. If there has been found a negligence in the case, it might be a ground for an indictment or an action; but that will not bear upon the question of evidence. Any evidence before the barrister as to the party who received or compared or returned the duplicate was superfluous. There are analogous cases where instruments required to be stamped have been stamped after their execution, upon payment of a penalty, and the courts have refused to allow any inquiry as to the time when the stamp was affixed: as in *Rex* v. *The Inhabitants of Preston* (*a*), where an indenture of apprenticeship, without premium, was executed on the 27th of *April*, 1825, but was not stamped till *July*, 1832, when a 1*l.* stamp was put on it, and a 5*l.* penalty paid. Afterwards a double duty (2*l.*) was paid. The indenture was offered in evidence to prove the settlement of a pauper by service under it; and it was held that as it was not within the statute 8 *Ann. c.* 9., which limits the time for stamping indentures, the court was not called upon to notice the circumstances under which the stamps were affixed. [*Tindal* C. J. The stamp acts merely require the courts *not to receive in evidence* instruments which are not duly stamped.]

(*a*) 5 *B. & Ad.* 1028., 3 *N. & M.* 31. See *antè*, Vol. IV. 178. n.

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In *Doe* dem. *Duncan* v. *Edwards* (*a*) it was held that where a document was produced with a seal *purporting* to be a seal of the insolvent debtors' court under the 7 *Geo.* 4. *c.* 57. *s.* 76 (*b*), it was not necessary to prove that the seal was actually the seal of the court. In that statute there are particular directions that the proper officer shall affix the seal; but upon the document being produced with a seal that merely purported to be the seal of the insolvent court, the court of Queen's Bench would not inquire into the duties of the officer. It was clearly intended, by the 100th section of the registration act, to obviate the necessity of going into any question before the barrister as to the previous acts required to be performed at the time of posting the notice.

If, however, the question as to the compliance with the statute is to be entertained, it is submitted that all *has* been done that was necessary. The postmaster has performed his duties *per alium*. The acts performed by his clerk might be taken advantage of either by, or against, the postmaster. The interpretation clause provides for acts, not to be performed by *agents*, but by persons who stand in the place of the parties specially named in the act. The legislature must be presumed to have had in view other statutes relating to the post-office. By the post-office management act, sect. 9. (*c*), it is enacted that the postmaster-general may appoint sufficient deputies, agents and servants under him for the better managing the post-office revenue; "and whenever the postmaster-general is, by the post-office laws empowered

(*a*) 9 *A.* & *E.* 554. 1 *P.* & *D.* 408.

(*b*) By which copies of the schedule, &c. purporting to be copied by the officer, &c. "and sealed with the seal of the said court," are to be admitted in evidence without any proof, "further than that the same is sealed with the seal of the said court." See 1 & 2 *Vict. c.* 110. *s.* 105.

(*c*) 7 *W.* 4. & 1 *Vict. c.* 30.

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or required to do any act, all such deputies, &c. according to the nature and extent of their commission or deputation or appointment, shall be construed to be so empowered or required, unless the contrary be expressed therein." The 100th section of the registration act may be considered as incorporated with the laws relative to the post-office; but there is nothing in that section to prevent the performance of the specified acts by deputy. The "postmaster" is, properly, the postmaster-general. The local postmaster is his deputy; and the postmaster's clerk is the servant of the local postmaster, or his deputy to do particular acts. The act of the servant is the act of the postmaster. There is nothing in the registration act to annex the duty to the person of the postmaster. The general rule of law is, that where a party is required to do any act which is not judicial or inseparable from his own person, he may do it by deputy; *Bac. Abr.* tit. *Offices and Officers* (L); *Com. Dig.* tit. *Officer* (B). In *Medhurst* v. *Waite* (*a*), it was held that a high constable might appoint a deputy for the purpose of billeting soldiers; though it was contended that that was a judicial act, as it was the effect of the judgment of the agent, and an appeal was given from his act. Lord *Mansfield* C. J. there said, "It is taking the definition too large to say that every act where the judgment is at all exercised, is a *judicial* act: a judicial act is supposed to be done *pendente lite* (of some sort or other)." In that case the high constable had to exercise some discretion and judgment, as the postmaster has here; but the duties required in either case might be efficiently performed by deputy. The requisition that the postmaster is to be "satisfied" that the notice and duplicate are alike, is not sufficient to raise judicial functions; for he is to be "satisfied"

(*a*) 3 *Burr.* 1259.

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merely by an inspection of the document. It does not follow because a particular person is mentioned in an act of parliament, that his servant or deputy is excluded. Thus, in *Phelps* v. *Winchcombe* (*a*), it was held that a deputy-constable was within the stat. 7 *Jac.* 1. *c.* 5., which gives double costs to a "constable" against whom an unsuccessful action is brought for any thing done in the execution of his office. Lord *Coke* in that case observed, "In divers places the custom is, that they do use in such cases to make a deputy, as in *London;* the writ is *vicecomiti*, he makes his deputy, the under-sheriff." (*b*) And again, referring to the statute under consideration, Lord *Coke* added, "by this statute double costs are given to a constable; and a *deputy*-constable is within the intent and meaning of it, for that he is a constable *pro tempore;* so a sheriff is named therein, and his under-sheriff shall have benefit of this also." (*c*) So, in *Medhurst* v. *Waite*, which turned upon the mutiny act, in which a constable is the party mentioned. [*Erskine* J. By the 100th section of the registration act, certain hours are to be fixed during which an objector may post his notice.] Probably that was for the purpose of ensuring the attendance of some person competent to perform the requisite functions.

The doctrine that the postmaster must perform all the acts personally, would give rise to great inconvenience. And if there is any doubt as to the construction of the statute, an argument *ab inconvenienti* (*d*) is entitled to consideration. Would it be considered necessary to prove before the revising barrister, that the party who examined the notices, &c. was the postmaster himself, and not a clerk? It would be almost

(*a*) 3 *Bulst.* 77.; 1 *Roll. Rep.* 274.; Sir *F. Moo.* 845.; 2 *Dunv. Abr.* 482. pl. 1.

(*b*) 3 *Bulst.* 77.

(*c*) 3 *Bulst.* 78.

(*d*) *Vide Co. Litt.* 11 *a*, 66 *a*.

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impossible to prove the identity of the party. In *Lea* v. *Howel* (*a*) it was held that, where a deputy *de fact* exercised the place in the custom-house, although h were not so *de jure*, it should not prejudice the mei chants who made certain compositions with him. Her the clerk is acting as the postmaster, and may be cor sidered as the postmaster *de facto*. So, in *Parker* v *Kett* (*b*), it was held that a surrender taken by one wh was steward of a manor *de facto*, though not *de jur* was good. And it was there laid down that a deput may do whatever his principal might have done, excep making a deputy.

Bompas Serjt., in reply. The cases of a sheriff, constable and a steward of a manor, are all instances c well-known officers. In such and other cases, custor has given the principal a power to appoint a deputy but it can only be for specific purposes. In *Miles* v *Bough* (*c*), which was an action for calls under th *Clifton* suspension bridge act (*d*), by the 109th sectio notices were required to be signed "by any three o more of the trustees, or by the clerk or clerks, for th time being, to the said trustees, by their order;" and i was held that a signature to notices by an attorney who acted for the clerks, and was deputed by them t make such signatures, was not sufficient.

Inconvenience may follow whichever way the act i construed; it must nevertheless be construed accord ing to its plain and expressed meaning. The objec of the enactment is, to protect against fraud; and fo that purpose the party selected to examine the notice is a responsible officer. As to the production of th

(*a*) *Cro. Eliz.* 533.
(*b*) 1 *Ld. Raym.* 658.; 1 *Salk.* 95.; *Ld. Holt*, 221.; 12 *Mod.* 467.
(*c*) 3 *Queen's Bench Rep* 845.; 12 *Law Journ. N. S Queen's Bench*, 74.
(*d*) 11 *G.* 4. & 1 *W.* 4. c. lxix

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stamped copy being conclusive evidence before the revising barrister, — the words of the section are "the production of *such* stamped duplicate shall be evidence," &c.; the word "such" refers to the whole preceding sentence. The question in this case is not with respect to a party acting *as* postmaster — if the case so stated it might probably be sufficient; but it is expressly stated that the party who performed the functions was the *managing clerk*, and that the postmaster was absent.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

The question before us in this case was, whether the delivery of the notice directed to *William Allen*, the person whose vote was objected to, was a sufficient delivery within the meaning of the hundredth section of the 6 & 7 *Vict. c.* 18.

The objection taken before the revising barrister was, that the notices, both open and in duplicate, were delivered to *the postmaster's managing clerk* instead of being delivered to the *postmaster himself*, who was proved to be absent from *Bradford* at the time such notice was delivered; and that the duties, as well of comparing the notice with the duplicate, as of stamping and returning the latter to the party bringing the same, were performed by the managing clerk, and not by the postmaster himself. And, whether this was a sufficient compliance with the requisites of the hundredth section of the statute, was the question. The revising barrister held that it was; and, upon consideration, we think his decision is right.

I must confess that my mind was at first strongly inclined to the opinion that the proper construction of the statute required the several acts specified in the hundredth section to be performed personally by the post-

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master; founding my opinion principally on the groun that the postmaster is named in the section without ar mention of a deputy or assistant and that the interpr tation clause (*s.* 101), which in some instances authoris acts, directed to be performed by principals, to be pe formed by subordinate officers, is silent as to the offi of postmaster. But, upon further consideration, I agr with my brethren in thinking that the intention of t legislature was, to authorise these acts to be done by clerk or servant of the postmaster at his office, acti in his aid and assistance, and under his direction an control.

That the term "postmaster" where it first occurs the section cannot be strictly and literally confined the postmaster personally, seems necessarily to follo from the extreme inconvenience that must result if suc construction should be adopted. According to th terms of the act, the notice and its duplicate are to b delivered to the postmaster. The delivery, therefore even to a clerk or servant at the office, although all th subsequent duties were performed by the postmaste himself, would, upon that construction, be no compliance with the statute. The very hand of the postmaste himself must be that into which the notice is delivered But the postmaster may be personally unknown to th party who brings the documents. What evidence is h to furnish himself with, that the delivery was made t the real postmaster, if that point should afterwards b contested? In what state of uncertainty must the part who sends his notice by the post be left, if, at the tim when he means to avail himself of it, he is liable to b defeated by evidence that it was not the postmaster him self, but a clerk who took it from his hands? The sam difficulty would equally apply to the performance c the other duties imposed on the postmaster; for it woul

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be dangerous and inconvenient that, after the objecting party has complied with the requisites of the statute so far as he was able, evidence might be given that the postmaster was disabled by illness from attending personally at the time, or that he was absent from some other unknown cause, and that the duties were performed (as in this instance) by his managing clerk. And, further, if the statute meant, that in every case, the comparison of the two documents must be made by the postmaster himself, it is obvious that, in populous places — take *London* for example, where a great number of these notices might come at the same time, and immediate transmission might be necessary — a compliance with the statute would be absolutely impracticable, if the eye and mind of the postmaster himself was essential to give validity to the notice, and the assistance of a clerk or servant inadmissible.

That the duty required by the act may *as well* be performed by an assistant managing clerk as by the postmaster himself, is undeniable. It cannot be said, with any ground of reason, that comparing the two documents together, and pronouncing them to agree, is a *judicial* act; the receiving of the documents, the stamping and returning of one of them to the person bringing them, it is needless to say, are *ministerial* acts, and those of the lightest order. We must therefore think, if the legislature had, for any reason, intended to confine the performance of the duty to the postmaster personally, there would have been an express provision to that effect; and that all that was required by the legislature was, that the party should deliver the notice open and in duplicate at the proper post-office for examination, within the hours properly notified under the act; that he should pay the proper fee for its registration, and wait for, and receive back, one of the duplicates stamped

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with the post-office stamp; after which the productio of such stamped duplicate is made sufficient evidence c the service of the notice. And, as this appears to hav been substantially complied with in the present case, w hold that the objection to the notice fails, and that th decision of the revising barrister is right and must b affirmed.

Decision affirme

Borough of GREENWICH.

DOBSON, Knight, Appellant; JONES, Respondent.

A., the surgeon of *Greenwich Hospital*, occupied, as such, a house at the infirmary in the hospital, which was appropriated to the surgeon. Repairs were done by the commissioners of the hospital. The surgeons to the hospital, when not provided with a residence within the hospital, were allowed a weekly sum lodging money. By the regulations of the commissioners of the hospital, officer of the hospital is allowed to make any exchange of apartments.

Held, that *A.* did not occupy the house "as tenant," inasmuch as he w *required* to occupy the same with a view to the more efficient performance of h duties as surgeon.

WILLIAM JONES objected to the name of *Richard Dobson*, Knight, being retained in the l of persons entitled to vote in the election of members f the borough of *Greenwich*, in respect of property situat within the said borough; in respect of the qualificati for which his name was inserted in the list, that is say,

House.	Infirmary.	Greenwich Hospital.

The facts of the case were as follows —

The appellant, who is the surgeon of *Greenwi Hospital*, has occupied a house at the infirmary in th hospital for the last nineteen years and upwards. It a house appropriated for the surgeon of the hospita

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and he occupies it as such. He took possession of the house upon being appointed surgeon, and has occupied it ever since. The house is of the clear yearly value of 10*l.* and upwards. The furniture in the house belongs to him. He did not pay for any fixtures on going into the house, and if any repairs are required, he applies to the commissioners of the hospital, by whom whatever is necessary is done. The name of the appellant is upon the rate-books, as rated for the house, and the rates and window-taxes in respect of it have been paid. No poor-rates or window-tax have ever been demanded from the appellant, nor has he ever paid or tendered the amount of any rate or tax for the said house, but the rates and the window-tax have always been paid by the commissioners of the hospital. It was stated by the appellant that he had never had any communication with the lords commissioners of the admiralty, by whom he was appointed surgeon of the hospital, upon the subject of the payment of the rates. The appellant also stated, that he had a written appointment, but he did not produce such appointment, nor did he shew by what tenure he held the office of surgeon. A printed paper, purporting to be particulars of a part of an order in council of the 23rd of *January* 1805, containing certain rules and regulations, was produced by the appellant, and which he stated he had received from the office of the inspector-general of hospitals at the admiralty-office, containing the following order: —

"Surgeons of hospitals, when not provided with a residence within the hospital, to be allowed fifteen shillings a week, lodging-money."

A book was also produced, copies of which had been furnished by the government to the different officers of the hospital, containing "Regulations established by the lords commissioners of the admiralty, for the govern-

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ment of *Greenwich Hospital*," dated the 4th of *June* 1829, and one of those regulations is as follows: —

"All officers and others, having separate apartments, are to inhabit those assigned to them; and no exchanges or other appropriation, of apartments or alterations therein are to be made without our express permission. They are to use their best endeavours to preserve them unimpaired, and in a neat and proper state of cleanliness and repair; and they will be required to make good any loss or injury arising from negligence or inattention on their part."

The regulations above referred to were made by the lords commissioners of the admiralty under and by virtue of an act of parliament, 10 *G.* 4. *c.* 25., intituled, "An Act to provide for the better management of the affairs of *Greenwich Hospital*;" by sect. 3. of which act it is enacted, "That the whole of the affairs of the said royal hospital, and the commissioners of *Greenwich Hospital* hereby appointed, and their successors to be appointed as hereinafter directed, and all other the officers and persons appointed to the said hospital and to any situations connected therewith, and to the schools of the said hospital, shall be under the authority, control and direction of the lord high admiral, or commissioners for executing the office of the lord high admiral, for the time being; and the appointment of all officers of the said hospital, civil and military, (except the governor, lieutenant-governor and commissioners of the said hospital, who shall be appointed by His Majesty, His heirs and successors) and the appointment of the chaplains thereof and of the rectors, vicars and perpetual curates of the livings and chapelries belonging, or which may belong, to the said hospital, and the establishing of rules, orders and regulations for the guidance of the commissioners of *Greenwich Hospital* and their successors, in the management of the estates and property of the said

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hospital and the admission of officers, pensioners and nurses into the said hospital, and the salaries to be paid to all such officers and persons respectively, shall be exercised by, and vested in, the lord high admiral, or commissioners for executing the office of lord high admiral, for the time being, who shall have full power to remove from the said hospital, and from any situation connected therewith, any officer or other person as aforesaid (except the governor, lieutenant-governor, and such commissioners, rectors, vicars and curates) who shall be guilty of any misbehaviour in their said respective situations of officers."

The case then stated that the revising barrister was of opinion, upon the facts above stated,—

First, that the appellant did not occupy as owner or tenant, within the meaning of the statute 2 *W.* 4. *c.* 45. s. 27.; and

Secondly, that he had not paid the rates and taxes pursuant to the enactment in the same section:

That consequently he was not entitled to have his name retained in the list.

And that the revising barrister therefore allowed the objection, and expunged the name of the appellant from the list accordingly.

(Signed) *J. E*—.
Revising Barrister.

The case was argued in last *Michaelmas* term. (*a*)

Byles Serjt., for the appellant. The questions in this case differ in some points from the *Chatham* cases (*b*), and are, first, whether the appellant occupied the house in question "as owner"; secondly, whether he occupied, "as tenant," and, thirdly, whether he has paid the rates and taxes.

(*a*) *Monday, Nov.* 20th, 1843.

(*b*) *Hughes*, app.; *Overseers of Chatham*, resp. *antè*, p. 54.

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First. By the statute 10 *G.* 4. *c.* 25. *ss.* 2. and 21. al the real property connected with the hospital is veste in the commissioners; the strict legal estate of the ap pellant's house is therefore in them. Although th nature of the appointment held by the appellant is n stated, it is not material; the third section of the a specifies the terms on which he holds; and it appea that the appointment is in the lords of the admiralty they are the only parties who have the power to remov the appellant for misbehaviour; it is therefore in effec an appointment for life; *Bac. Abr.* tit. *Offices* and *Offi cers*, H. (*a*) The case states in effect that the residenc is annexed to the appellant's office, being "appropriate for the surgeon of the hospital." The appellant is th *owner* of the house, in the ordinary and popular sense o the term. If he had claimed to vote for the county, h would have shewn that he had an office for life, and tha he was the occupier of the house annexed to such offic He would have been entitled to a vote, as in the case of parish clerk or schoolmaster, &c. *Rogers El.* 126. *et seq Elliot Reg.* 22. *et seq.* Two parties must concur, befor the appellant could be legally turned out of possessior The commissioners of the hospital, in whom is the lega estate, are the only parties who could eject him, but the could not do so, unless he were dismissed by the lords c the admiralty. The twenty-seventh section of the refor act does not require the occupier to be the *legal owne* of the premises, but merely that he should occupy the "*as* owner." If the *legal* owner were intended, neither mortgagee nor *cestui que trust* in possession, could vote nor a parish clerk or a dissenting minister, where th legal property was vested, as is usual, in trustees. [*Col man* J. The right to vote is in such case generally an nexed to the office.]

(*a*) Citing *Co. Litt.* 42.; *Roll. Abr.* 844.; *Show. Parl. Ca.* 161. And see 2 *Hayes*, on *Convey ancing, &c.* 38 *n.* 5th ed.

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Secondly. The appellant is at least tenant at will to the commissioners of the hospital, who are the strict legal owners. He has sufficient interest to maintain trespass against a wrong doer. It is not necessary to contend that he could bring trespass against the commissioners; for if he is tenant at will to them, their entry would determine the will. But the question is, could the commissioners bring trespass or ejectment against him, without a previous demand of possession? It is submitted they could not, even if the lords of the admiralty were out of the question. [*Tindal* C. J. How far would that doctrine hold, where the occupation was in respect of services? In the case of a shepherd or coachman occupying premises belonging to his master, he might perhaps maintain trespass against a wrong doer, but he would hardly be considered a tenant.] In *Rex* v. *The Inhabitants of Chediston* (*a*) a pauper, who rented a farm in *C.* assigned it to *P.* upon trust to cultivate it and pay the pauper's debts &c. The lease expired in 1817; no settlement of accounts took place; but *P.*, without the authority of the pauper, then hired a house in *H.* at the yearly rent of 18*l.*, to which the pauper and his family removed, and they resided there for more than two years. The pauper never paid any rent or taxes, but *P.* was rated and paid the rent and taxes; and it was held that the pauper gained a settlement in *H.* by the occupation of the house. In *Rex* v. *The Inhabitants of Lakenheath* (*b*), the master of a charity school, who was removable from his office at pleasure, resided for seven years, rent free, in a house of the annual value of 10*l.*, where other parish schoolmasters had resided before. Part of the house he underlet to the parish at an annual rent; and it was held that this was a coming to settle upon a tenement of the value of 10*l.* per annum, within

(*a*) 4 *B.* & *C.* 230.; 6 *D.* & *R.* 269.

(*b*) 1 *B.* & *C.* 531.; 2 *D.* & *R.* 816.

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the meaning of the 13 & 14 *Car.* 2. *c.* 12.; a pauper thereby gained a settlement. *Holroyd* in that case, "I think that the schoolmaste at will of this house. The legal possession was in him, and not in the lord or receiver of *Rex* v. *Fillongley* (*a*), there cited, is to the sam *Rex* v. *Camfield* (*b*), the occupation of a hous who was a toll-collector, and stood in the si servant to his employers, was held sufficien an indictment for burglary in the house wh scribed as the dwelling-house of the coll appellant would be tenant at will to the con even if their discretion were not fettered; bu much stronger when their will is restrained that the appellant cannot be dismissed duri haviour. [*Maule* J. Where does it appea appointed during good behaviour?] It is to from the third section of the 10 *G.* 4. [*Mau* section does not appear to restrict the lo admiralty to appointments during good beh there any necessity that a party appointed the hospital must continue so for life? Supp came old or blind.] Probably he would be situation as the rector, and would be compe form his duties by deputy. [*Maule* J. The rector may be provided for by the ecclesi with which *we* are not acquainted. (*c*)]

(The argument upon the second point ra revising barrister, as to the sufficiency of the the rates, is omitted, as the court did not pro

(*a*) 1 *T. R.* 458.

(*b*) *Ry. & Moo. C. C.* 42.

(*c*) In *The Fountains Abbey* case, *M.* 9 *H.* 6. fo. 32. pl. 3., *Paston* J. says, "If a man marry his mother, this is a lawful marriage *with us* till it be defeated; for wh and espousals are *ecclesiæ*, that is *us*; and it does *us* to inquire whe *lawful* marriage o

opinion upon it. *Litt. S.* 334.; *Co. Litt.* 206. *a.*; 18 *Vin. Abr.* tit. *Ratihabitio*; *Cullen* v. *Morris* (*a*), *R.* v. *Lower Heyford* (*b*), *R.* v. *Openshaw* (*c*), and 6 & 7 *Vict. c.* 18. *s.* 75. were cited on the part of the appellant; and *R.* v. *South Kilvington* (*d*), *R.* v. *Bridgnorth* (*e*), and *R.* v. *Melsonby* (*g*), on the part of the respondent.)

Kinglake for the respondent. The appointment of the appellant is clearly not an office. There is nothing to distinguish this from the common case of master and servant. The appellant is similarly situated to the surgeon of any other hospital. He is paid by a salary under the act of parliament. It is not the case of an annexation of a house to an office. The lords of the admiralty may change the lodgings of the surgeons, or may provide them with a residence elsewhere and furnish them with lodging-money. A parish clerk or a schoolmaster does not vote in respect of his office. If a parish clerk is in possession of lands of the value of 40*s.*, an old endowment will be presumed, and he is considered as a freeholder; and in that way only is he entitled to vote. So, the schoolmaster. *R.* v. *Lakenheath* (*h*) established that a parish schoolmaster, so far from having a freehold, was only a tenant at will; the case is therefore directly opposed to the doctrine set up in the first branch of the argument on the other side. (*i*) In *Rex* v. *Chediston* no service was to be rendered. Here, the occupation is in respect of service only.

Byles Serjt. was heard in reply.

(*a*) 2 *Stark. N. P. C.* 577.
(*b*) 1 *B. & Ad.* 75, *antè*, 47.
(*c*) 1 *W. Bla.* 463.; *Burr. Sett. Ca.* 522.
(*d*) 3 *G. & D.* 157.
(*e*) 10 *A. & E.* 66.; 2 *P. & D.* 317.
(*g*) 12 *A. & E.* 687.
(*h*) *Suprà*, 117.
(*i*) An equitable estate being sufficient, a party who is merely tenant at will *at law*, is often qualified to vote as *cestui que trust* of the freehold, copyhold or leasehold; see 2 *Hayes on Conveyancing, &c.* 38., 5th ed.

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TINDAL C. J., now delivered the judgment of the court.

In delivering our opinion upon a former case, in which *Hughes* was the appellant, and the overseers of the parish of *Chatham* were the respondents (*a*), we laid down at some length the principle upon which we thought the class of cases to which the present appeal belongs, ought to be decided; and we drew the distinction between those cases where officers or servants in the employment of government are *permitted* to occupy a house belonging to the government as part remuneration for the services to be performed, and those in which the places of residence are selected by the government, and the officers or servants are *required* to occupy them, with a view to the more efficient performance of the duties or services imposed upon them. Upon that occasion, we declared our opinion to be that those officers or servants who fell within the first description might properly be considered to occupy as tenants, although the residence was allotted to them as such officers and servants, and although they might, if such residence had not been allowed to them, have had an additional allowance for lodging-money; whilst at the same time, we stated that the relation of landlord and tenant could not be created by the appropriation of a particular house to an officer or servant as his residence, where such appropriation was made—with a view, not to the remuneration of the occupier, but to the interest of the employer, and to the more effectual performance of the service required from such officer or servant: upon the same principle as the coachman who is placed in rooms of his master over the stable, the gardener who is put into a house in the garden, or the porter who occupies the lodge at a park gate, cannot be considered to occupy as tenants, but as servants merely

(*a*) *Antè*, p. 54. 77.

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whose possession and occupation is strictly and properly that of their masters.

In deciding, therefore, the present appeal, we have only to consider within which of the two classes the present case ranges itself.

It is found by the case that the appellant is the surgeon of *Greenwich* Hospital; that the house which he occupies is in the infirmary; that he occupies it as such surgeon. Now, the nature of the office of surgeon to the hospital is such, that a residence in some known and certain dwelling may reasonably be required for the due performance of the duties of his office. But it is further found that he was placed in it, when he was first appointed (nineteen years ago), and that he has continued to occupy it ever since, and that it is the house appropriated to the surgeon for the time being. And lastly it is found, by the revising barrister, that, by the regulations established by the lords commissioners of the admiralty, the officers of the hospital having apartments, are to inhabit those assigned to them, and that no exchanges, or other appropriations, are to be made, without permission.

The revising barrister, upon this state of the evidence before him, appears to have come to the conclusion that the appellant does not occupy this house, simply *by permission* of the government, and as part of the remuneration for his services as surgeon, but that he is *required* to occupy this house, with a view to the more efficient performance of the duties of his office; and, consequently, that there was no occupation by him in the legal relation of tenant to a landlord. And, upon the state of facts so brought before the revising barrister and set out upon the case, we cannot say he has come to a wrong conclusion in point of law.

One ground of argument taken by the counsel for the appellant was, that the appellant might, upon the

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facts stated in the case, be considered as *the owner*. But we think the facts therein stated shew that the lords commissioners of the admiralty (*a*) are, within the proper legal sense of the word, the owners of the house too clearly to admit of an argument.

As we hold the decision to be right, by giving effect to the first objection against the appellant's right to vote that is, by holding there is no occupation as tenant, it becomes unnecessary to consider the second objection, which relates to the mode of paying the occupier's rates.

We therefore think that the decision of the revising barrister must be affirmed.

Decision affirmed.

(*a*) By the 7 & 8 *W.* 3. *c.* 21. it is recited that the Crown had granted the site of the intended hospital to trustees and commissioners and their heirs; and by the 10 *G.* 4. *c.* 25. *ss.* 2. and 21. all the real property of the hospital is vested in the commissioners. And see 54 *G.* 3. *c.* 110.

END OF CASES UPON APPEAL FROM THE DECISION OF REVISING BARRISTERS.

CASES

ARGUED AND DETERMINED 1843.

IN THE

COURT OF COMMON PLEAS,

IN

Hilary Term,

IN THE

SIXTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in bank during this term were,

TINDAL C. J.	ERSKINE J.
COLTMAN J.	MAULE J.

GRANT *v.* MOSER. *Jan.* 18.

To a declaration for false imprisonment, the defendant

TRESPASS for false imprisonment. The declaration, after stating, in the usual form, an assault upon, and the imprisonment of, the plaintiff, at a police station, pleaded that the plaintiff *with force and arms* came to the door of the defendant's house, and *with great force and violence* attempted to enter against the will of the defendant, and wilfully and wantonly rang the door bell, without lawful occasion, and made a great noise and disturbance, to the annoyance and disturbance of the defendant, and *against the peace of the Queen*, and (after request to cease), continued making such noise, &c. without any lawful excuse; and thereupon the defendant, *in order to preserve the peace* and render good order and tranquillity in his house, gave the plaintiff in charge to a policeman:

The plea was held bad, as not shewing that, at the time the plaintiff was given in charge, he was committing a breach of the peace, or that there was reasonable ground for apprehending that a breach of the peace would be committed.

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on the 9th of *April* 1842, proceeded to allege that tl defendant detained the plaintiff in prison for a lor time, to wit, &c., and until the plaintiff, in order t obtain his discharge from such custody, was afterward to wit, on the 10th of *April*, in the year aforesaid forced and obliged to procure bail and surety for hi appearance at a metropolitan police court, to wit, th *Marylebone* police court, on the 11th of *April* next, t answer a certain charge, to wit, for breach of the peac to be then and there preferred against him by the de fendant; that the plaintiff did then, to wit, on the 10t of *April*, in order to obtain his discharge from the sai imprisonment, procure *Thomas Shaw*, of &c., to be h bail and surety for his appearance at the said polic court aforesaid, and did then, together with the sai *T. S.*, enter into a certain recognizance in a certain pen sum for his appearance at the said police court as afor said: by means of which premises the plaintiff wa forced and obliged to attend, and did necessarily atten on the 11th of *April*, at the said police court to answe the said charge of the defendant, and was then an there detained in waiting until the said charge could b heard, and under examination upon the said charge, fc a long time, to wit, twelve hours then next following Special damage to the plaintiff in preventing his a tending to his business of a cabinet-maker, and in th expense in procuring the said bail and surety and hi discharge from the said imprisonment, and in defendin himself from the said charge, &c.

Third plea. As to assaulting the plaintiff, and takin him to a police station, and detaining him in priso — that, before and at the said time when &c., to wi on the day and year in the declaration in that beha mentioned, the defendant was lawfully possessed of certain dwelling-house, situate in the parish of *St. Mary lebone*, in the county of *Middlesex*, and known as Nc

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plaintiff into his custody to be dealt with according to law; and the said policeman so being such constable as aforesaid, at such request of the defendant as aforesaid, then gently laid his hands on the plaintiff for the cause aforesaid, and did then take the plaintiff into his custody, in order to carry and convey him to the said metropolitan police court, to wit, the *Marylebone* Police Office aforesaid, to be there dealt with according to law, for his said offence *and breach of the peace;* and, because it was then late at night, and an unseasonable time for the said policeman to carry and convey the said plaintiff to such metropolitan police office as aforesaid, the said policeman, so being such constable as aforesaid, for that reason, and for the cause aforesaid, did necessarily and unavoidably force and compel the plaintiff to go as a prisoner and in custody into, through and along the said public streets and highways unto the said police-station in the declaration mentioned, the same being the nearest police-station to the said dwelling-house of the defendant, and, inasmuch as the day next following such taking of the plaintiff into custody as aforesaid was *Sunday*, did necessarily and unavoidably then and there imprison the plaintiff for the time in the declaration mentioned, and until he the plaintiff did procure such bail and surety as in the declaration in that behalf mentioned, and did afterwards, to wit, on the 11th of *April* in the declaration in that behalf mentioned, force and oblige the plaintiff to attend at the said police court in the declaration in that behalf mentioned, to answer the said charge of the defendant, and did there then necessarily and unavoidably detain the plaintiff for the said time in the declaration in that behalf mentioned, as he lawfully might for the cause aforesaid; which were the same alleged trespasses in the introductory part of that plea mentioned, and whereof the plaintiff had above complained against the defendant. Verification.

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Special demurrer, assigning for causes — that it did not appear in or by the said plea that the plaintiff was committing any breach of the peace at the time he was given in charge by the defendant to the said police constable, or that there was any reasonable ground to apprehend that he would commit any breach of the peace, or that it was necessary to preserve the peace that the plaintiff should be given into custody as aforesaid; that, for any thing that appeared in or by the said plea, the said supposed breach of the peace might have wholly ceased, and there might have been no reason to apprehend a repetition or continuation thereof at the time the defendant gave the plaintiff in charge to the said police constable; that the defendant had no authority by law to arrest or imprison or give the plaintiff in charge to a constable in order that he might be punished for a past breach of the peace, as stated in the plea, but only in order to prevent him from committing a breach of the peace (*a*); and it should have appeared distinctly clearly in and by the said plea that there was good and and probable reason to suspect that the plaintiff would commit a breach of the peace unless he were arrested and imprisoned; that it did not appear in or by the said plea that the said noise, disturbance and ringing at the said door-bell, which it was alleged the plaintiff made after the request of the defendant in the plea mentioned, was made by the plaintiff in breach of the peace of our Lady the Queen; that it did not appear in or by the said plea that either the defendant or the police constable saw or had view or heard the said noise, disturbance, or ringing; that the said ringing of the door-bell was, at the most, a mere civil trespass, and for which the defendant could not proceed criminally against the plaintiff, and could not even require from him surety of the peace; that it did not appear that the defendant

(*a*) *Vide antè*, Vol. II. 461 (*a*).

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attempted to justify the arrest and imprisonment of t plaintiff under any statute, but by virtue of the comm law, and the common law does not give the defend any authority to arrest or imprison the plaintiff unc the circumstances stated in the plea; and that it did n appear that either the defendant or the constable h authority to arrest or imprison the plaintiff under a statute, since it did not appear that the supposed offen was committed by the plaintiff in any thoroughfare o public place, or within the limits of the metropolita police district, or that the plaintiff, by ringing the sai door-bell, wilfully and wantonly disturbed any inhabi ant of any dwelling-house. (*a*) Joinder.

Bompas Serjt., for the plaintiff. The question raise by the pleadings amounts to no more than this, wheth the ringing at a door-bell amounts to a breach of t peace, so as to justify the arrest of a party by a priva individual; *Hawk. P. C.* bk. 1. c. 63. s. 11. [*Ti dal* C. J. The defendant certainly, instead of pleadi evidence, ought to have alleged that the plaintiff w committing a breach of the peace.] The plea clear does not shew any breach of the peace. In *Timothy Simpson* (*b*) the plea justifying the imprisonment of t plaintiff, alleged that an affray had been committe [*Cresswell* J. And it appeared that there was danger

(*a*) The metropolitan police act (2 & 3 *Vict. c.* 47.), sec. 54. enacts "that every person shall be liable to a penalty of not more than forty shillings, who, within the limits of the metropolitan police district, shall, *in any thoroughfare or public place,* commit any of the following offences; that is to say.

* * * *

"16. Every person who shall wilfully and wantonly *disturb any inhabitant* by pulli or ringing any door-bell knocking at any door withc lawful excuse: * *

"And it shall be lawful any constable belonging to t metropolitan police force take into custody, without w rant, any person who sh commit any such offence *with view of any such constable.*"

(*b*) 1 *C. M. & R.* 757., *Tyrwh.* 244.

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Talfourd Serjt., for the defendant. It is submi that the plea sufficiently discloses a breach of the pe at the time of the arrest. After stating that the plai "with force and arms" came to the house and viole rang the bell, and continued so doing after being quested to desist, it states that "thereupon" (wh must mean *instanter*) the defendant gave him in cha In *Baynes* v. *Brewster* (*a*) a plea justifying the plaint arrest for creating a disturbance by rapping at the fendant's door was held bad because it appeared t the disturbance was over at the time of the arr [*Tindal* C. J. And that, although the plea stated t the defendant gave the plaintiff in charge "in order preserve the peace." *Cresswell* J. What allegatio there in this plea of any thing having been done breach of the peace?] It alleges that the disturba took place "against the peace of our Lady the Que [*Tindal* C. J. Those are mere *verba sonantia.* party cannot arrest another for a mere unlawful *Cresswell* J. Every trespass is laid as a breach of peace. Suppose the plaintiff had blown a horn in front of the defendant's house, that might have bee breach of the metropolitan police act (*b*); but it wo not have been a breach of the peace. *Tindal* C. J. make this a good defence there should be a direct legation either of a breach of the peace committ at the time of giving the plaintiff into custody, or t a breach had been committed, and that there reasonable ground for apprehending its renewal.]

The learned serjeant then prayed and obtained Leave to ame

(*a*) 2 Q. B. 375.; 1 G. & D. 669.

(*b*) 2 & 3 *Vict.* c. 47. sect. 54. div. 14.

The Wardens and Commonalty of the Mystery of Fishmongers of the City of London *v.* John Robertson, John Gyllyatt Booth, Francis William Staines, and Four Others.

Jan. 19.

A declaration in assumpsit by a corporation, stated that the defendants had presented a petition to the House of Commons for leave to bring in a bill for draining certain slob or waste lands in *Ireland*, the introduction of which bill was opposed by the plaintiffs, and also by *A.*; and that by a certain agreement made "between *B.* on behalf of the plaintiffs, of the first part, *C.* on behalf of *A.* of the second part, and the defendants of the third part, it was agreed that the plaintiffs and *A.* should withdraw all opposition to the bill; that the clauses therein should be settled by the solicitors of the parties, in order that the bill might be as perfect and beneficial as it could be made; that the plaintiffs and *A.* should use all reasonable means and endeavours to promote the progress of the bill; that part of the slob should be allotted to the plaintiffs, and part to *A.*; that the defendants would, on the passing of the act, pay the plaintiffs 1000*l.*; and that the defendants would pay all costs of obtaining the act; that by a memorandum indorsed upon the agreement, with the consent of all parties, and signed by *D.* as agent to the defendants, it was declared that the plaintiffs and *A.* were severally and jointly bound; that the 1000*l.* was to be paid to the plaintiffs for expenses incurred by them in a survey and for plans, &c. of which the defendants were to have the benefit; but that the plans, &c. were to be returned to the plaintiffs if the 1000*l.* were not paid. The declaration then stated, that in consideration of the agreement and memorandum, and of the premises, and that the plaintiffs would perform all things in the said agreement &c. on their part, the defendants promised to perform all things therein on their part, so far as concerned the interest of the plaintiffs; that the plaintiffs delivered the plans, &c.; that they withdrew all opposition to the bill; that *A.* did the same, &c., whereof the defendants had notice.

Held, that it might be inferred that the contract was not under seal.

Held also, that it was not such a contract as would fall within the exceptions to the general rule requiring corporate contracts to be by deed. But

Held also, that the contract having been *executed* on the part of the corporation, and the defendants having received the full consideration, the latter were bound by the contract, and the plaintiffs were entitled to sue thereon.

Semble, that if the contract had remained *executory*, the fact of the corporation having put it in suit would have amounted to an admission on record of their liability under it, so as to estop them from disputing such liability in a cross action.

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after in that count mentioned and set forth, a petitic had been presented to the House of Commons, ar was then pending, at the instance and on behalf of tl defendants, that is to say, for leave to bring into th said House of Commons a bill for draining, embankir and reclaiming certain slob or waste lands in *Lou Swilly* and *Lough Foyle*, in the counties of *Donegal* ar *Londonderry*, in *Ireland*; that the plaintiffs, before an until and at the time of making of the said articles agreement thereinafter next mentioned, had opposed and were then opposing, and objected to, the bringing i and passing of such bill: that one *Robert Ogilby* at thos times also objected to, and opposed, the introduction o the same bill, separately and apart from the plaintiffs and on his own behalf: that theretofore, to wit, on th 17th of *March*, 1838, by certain articles of agreemen in writing then made and entered into by and betwee *J. D. Towze*, for and on behalf of the plaintiffs, therei described as the wardens and commonalty of the mister

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Semble also, that up to the time of the corporation adopting the contract b performing the condition on their part, there was a want of mutuality, as the could not be compelled to perform the contract; and consequently that the de fendants during that interval had the power to retract.

Held, that, the interest of the plaintiffs and of *A.* being several, the latter wa properly omitted to be made a co-plaintiff.

Held also, that the agreement declared upon was not illegal as being an agre ment against public policy.

Held also, that a plea — that the bill was not as perfect and beneficial as might have been made, was no answer to the action.

Held also, that the using by the plaintiffs of all reasonable means and endea vours to procure the bill to pass, was not a condition precedent, and therefo that a plea traversing that averment was bad.

Held also, that a plea stating that the plaintiffs had presented a petition to th House of Lords against the preamble of the bill was bad, as amounting at lea to an argumentative traverse of one of the two averments, — that the plaintif withdrew their opposition, and that they used all reasonable means to promo the bill.

Semble, that a plea directly traversing the averment, that the plaintiffs withd drew their opposition, was good.

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to the further progress of the bill to be brought into Parliament, and promoted by the defendants, the parties thereto of the third part, for draining, embanking and reclaiming the said slob or waste land in *Lough Foyle* aforesaid; that the several powers and authorities to be granted by the said bill, and the several clauses, provisoes and restrictions and stipulations therein to be contained, should be agreed upon and settled by and between the solicitors of the said parties to the said agreement before any proceedings should take place thereupon in committee of either House of Parliament to the intent and with the object that the said bill might be as perfect and beneficial for the interest of all the said parties in the reclamation of the said slob or waste land as it could be made; and that, if, in framing and perfecting the said bill, any difference or dispute should arise between the said parties, or any of them, in regard to any clause, matter or thing which any of the said parties might desire to insert or have omitted in the said bill, such difference or dispute should be referred forthwith to a certain person in the said agreement described as *P. B. Brodie*, Esq., of *Lincoln's Inn Fields*, for his opinion and determination, which should be final and conclusive on the said parties; that the plaintiffs and *R. O.* respectively should, by petition or otherwise, at the expense of the defendants, use all reasonable means and endeavours to promote the progress of the bill, and procure an act of parliament to pass thereupon; that such part of the said slob or waste land as was opposite to the plaintiffs' estate, bounded by the canal on the one side and by Mr. *Maxwell's* property on the other, and extending to the site of the proposed embankment, as laid down in Mr. *M'Neil's* plan, should be allotted and given to the plaintiffs; that a proportion equal to one-tenth part of the whole of the slob or waste land opposite to the frontage of the lands of the said *R. O.*, which should be

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claim derived from or under the plaintiffs and the said *R. O.* respectively, which should or might be made by any of their said tenants respectively in, to, or upon the said slob or waste land, or any part thereof, save and except as to any contract or engagement which might have been then entered into by the defendants, or any or either of them, in respect thereof: That after the making of the said articles of agreement, to wit, on the said 17th of *March* 1838, by a certain memorandum then written and indorsed on the said articles of agreement, by and with the consent and approbation of all the said parties to the said articles of agreement, and then signed by one *J. M. Pearce* as the solicitor and agent of the defendants, it was declared to be understood between the said parties to the said articles of agreement, that the plaintiff and the said *R. O.* were only severally, and not jointly, held and bound for the fulfilment of the said agreement on their own respective parts, but not for each other; and that the sum of 1000*l.* so in the said articles of agreement mentioned to be paid to the plaintiffs was for certain costs and expenses which they the plaintiffs had been put to during the then present year, partly in a certain survey made by Mr. *M'Neil*, and for his plans and valuations, which survey, plans and valuations the defendants were to have the benefit of; but that they were to be forthwith returned to the plaintiffs if the said sum of 1000*l.* should not be duly paid as mentioned in the said agreement; and it was also thereby agreed that the said agreement for withdrawing the opposition to the bill and facilitating the same as in the said articles of agreement mentioned, should only be and remain in force for the then present session of parliament 1837–1838. And that the said articles of agreement and the said memorandum, so indorsed thereon as aforesaid, having been so made as aforesaid, afterwards to wit, on the said 17th of *March* in the year last aforesaid, in consideration thereof, and of the pre-

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mises aforesaid, and also in consideration that the plaintiffs would then observe, perform, fulfil and keep all things in the said articles of agreement and memorandum contained on their part and behalf to be observed, performed, fulfilled and kept, the defendants then promised the plaintiffs that they the defendants would observe, perform, fulfil and keep all things in the said articles of agreement and memorandam contained on their part and behalf to be observed, performed, fulfilled and kept, so far as concerned the interest of the plaintiffs. That thereupon afterwards, to wit, on, &c., last aforesaid, and on the faith of and in pursuance of the terms of the said articles of agreement and memorandum, they the plaintiffs, confiding, &c. did deliver to the defendants, and the defendants then received from the plaintiffs the said survey and plans and valuations in the said memorandum mentioned, and being of great value, to wit, of the value of 1000*l.*; and the defendants then and from thence hitherto have actually had and enjoyed the full benefit and advantage thereof according to the true intent and meaning of the said memorandum, and had derived great benefit and advantage therefrom; that, from the time of the making of the said articles of agreement and memorandum, and the said promise of the defendants in that behalf, and on the faith thereof, they, the plaintiffs, did withdraw all opposition to the introduction of the said bill, in the said articles of agreement mentioned and referred to, into parliament, and to the proceedings of the defendants necessary for that purpose; and that the said *R. O.* having then also in like manner withdrawn all such opposition as last aforesaid, thereupon and by reason of the withdrawal of such opposition to the introduction of the said bill as aforesaid, to wit, on the 23d of *March* 1838; and during the said session of parliament in the said memorandum mentioned, they, the defendants, ob-

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tained leave to bring in and introduce their said bill *into* parliament, to wit, into the House of Commons: and the same bill was afterwards, to wit, on the 26th of *March* in the year last aforesaid, accordingly brought in and introduced, to wit, into the House of Commons, and there promoted by the defendants, that is to say, for draining, embanking and reclaiming the said slob or waste land in *Lough Foyle* as aforesaid; which said bill was intituled, and in fact was, "A bill for draining and embanking certain lands in *Lough Swilly* and *Lough Foyle*, in the counties of *Donegal* and *Londonderry*," and was and is the said bill so intended to be brought into parliament, and promoted by the defendants, as in the said articles of agreement mentioned, in pursuance of the said petition therein also mentioned; that, after the bringing in of the said last-mentioned bill, and before any proceedings took place in committee of either house of parliament upon the powers and authorities to be thereby granted, or the clauses, provisoes, restrictions and stipulations therein contained or to be contained or any of them, to wit, on the said 26th of *March* 1838, and on divers days and times between that day and any proceedings taking place as last aforesaid in committee of either house of parliament, the several powers and authorities granted or to be granted by the said last-mentioned bill, and the several clauses, provisoes, restrictions and stipulations therein to be contained, were discussed and considered by the respective solicitors of and for the plaintiffs and the said *R. O.* and the defendants respectively, to the intent and with the object that the said last-mentioned bill might be framed and perfected so as to be as perfect and beneficial for the interest of all the said parties in the reclamation of the said slob or waste land as it could be made, according to the true intent and meaning of the said articles of agreement and memorandum: that, in framing

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and perfecting of the said bill as last aforesaid, and during such discussion and consideration, divers disputes and differences having then arisen between the said parties in regard to certain clauses, matters and things which the plaintiffs and the said *R. O.* and the defendants respectively then wished to insert, and to certain other clauses, matters and things which the plaintiffs and the said *R. O.* and the defendants then respectively wished to omit, in and from the said last-mentioned bill, the same disputes and differences were then, to wit, on the 4th of *May* in the year last aforesaid, in pursuance of the said agreement in that behalf, forthwith referred by the plaintiffs and the said *R. O.*, and the defendants to the said *P. B. B.*, for his opinion and determination: that afterwards, and before any proceedings were taken thereupon in committee of either house of parliament, to wit, on the day and year last aforesaid, the said *P. B. B.*, with the consent, and at the request, of the plaintiffs and the said *R. O.* and the defendants, (*the plaintiffs and the said R. O. and the defendants respectively, then mutually agreeing to be bound and concluded thereby, as to the said matters in difference and dispute,*) did give his opinion and determination upon the said clauses, matters and things so in dispute and difference, and referred to him as aforesaid; that afterwards, and before any proceedings took place thereupon in committee of either house of parliament, to wit, on the day and year last aforesaid, the last-mentioned bill, and the several powers and authorities to be thereby granted, and the several clauses, provisoes, restrictions and stipulations therein to be contained, to wit, as settled and determined by the said *P. B. B.* as aforesaid, were agreed upon, determined and settled by and between the plaintiffs and the said *R. O.* and the defendants, and their respective solicitors, to wit, to the intent and with the object aforesaid; and the same last-mentioned bill so

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agreed upon, settled and determined as last aforesaid then was as perfect and beneficial for the interest of the said parties in the reclamation of the said slob or waste land as the same could be made, according to the true intent and meaning of the said articles of agreement and memorandum, and the said promise of the defendants: that, among other clauses, provisoes, restrictions and stipulations contained in the said last-mentioned bill so settled and agreed upon as last aforesaid, were contained divers clauses and stipulations whereby the said part of the said slob or waste land which was so agreed to be allotted and given and reserved to the plaintiffs as thereinbefore was mentioned, was and would be, on the passing of the said bill, as so settled and agreed upon as last aforesaid, allotted and absolutely reserved in and by the said intended act to the plaintiffs and their successors, free and indemnified of and from and against all costs, charges and expenses attending the embanking, draining and reclaiming the said slob, or any other charge, stipulation, restriction or condition whatsoever, according to the true intent and meaning of the said articles of agreement and memorandum respectively: that all opposition to the introduction of the said bill into parliament having been so withdrawn as aforesaid, and the same bill having been so introduced into the House of Commons as aforesaid, and the said several powers and authorities to be granted by the said bill when passed into a statute, and the several clauses, provisoes, restrictions and stipulations to be therein contained, having been determined, agreed upon and settled as last aforesaid by and between the plaintiffs and the defendants and the said *R. O.*, and their respective solicitors, according to the true intent and meaning of the said articles of agreement and memorandum; they, the plaintiffs, further confiding &c., did thenceforth continually from time to time, and at all

times up to and until the time of the passing the act of parliament thereinafter in that count mentioned, use all reasonable means and endeavours to promote the progress of the said bill so determined, agreed upon and settled as aforesaid, and to procure an act of parliament to pass thereupon, according to the true intent and meaning of the said articles of agreement and memorandum; and did withdraw all opposition of them, the plaintiffs, to the progress of the last-mentioned bill, according to the true intent and meaning of the said articles of agreement and memorandum; and that, after the making of the said promise of the defendants, and before the passing of the act of parliament lastly above referred to, to wit, on the 11th of *May* 1838, they, the plaintiffs, did, in further pursuance of the said articles of agreement, and on the faith of the said promise of the defendants, and at their request, present a petition to the House of Commons in favour of the said bill so brought in and promoted by the defendants, whereby it was prayed by the plaintiffs that the said bill might pass into a law; and that they, the plaintiffs, by means of the said petition and otherwise, did endeavour to promote the progress of the said last-mentioned bill, and to procure an act of parliament to pass thereupon, according to the true intent of the said articles of agreement and memorandum; that the said *R. O.* did also, in like manner, withdraw all opposition to the progress of the said bill so determined, agreed upon and settled as aforesaid, and also use all reasonable means and endeavours to promote the progress of the said last-mentioned bill, and to procure an act of parliament to pass thereupon as last aforesaid: that, through and by means of the plaintiffs having so endeavoured, and in and about their said endeavours, to promote the progress of the said last-mentioned bill, and to procure an act of parliament to pass thereupon as aforesaid, they, the

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plaintiffs, had been and were necessarily put to an occasioned, and obliged to, and did actually incur, sus tain and pay, certain reasonable and proper costs and expenses, amounting to a large sum of money, to wit, 1200*l.*: that such costs and expenses were so incurred and sustained from time to time at the request of the defendants, and during the said session of parliament in the said memorandum mentioned: that afterwards, and during the said session of parliament in the said memorandum mentioned, and long before the commencemen of this suit, to wit, on the 27th of *July* 1838, the said last-mentioned bill so brought into parliament as afore said, with divers alterations in the same, and addition thereto, and which had not been settled or agreed upo by the plaintiffs, or their solicitor, or referred to o determined upon by the said *P. B. Brodie*, was passe and carried through parliament, and then received th assent of our Sovereign Lady Queen *Victoria*; and th same then, to wit, on the day and year last aforesaid became and was, and thence hitherto has been, an still is an act of parliament made and passed in th session of parliament held in the first and second year of the reign of Queen *Victoria*, and was and is intitule "An act for draining and embanking certain lands i *Lough Swilly* and *Lough Foyle*, in the counties of *Don gal* and *Londonderry*," of which the defendants then ha notice; that the plaintiffs and the said *R. O.* had been a all times since the making of the said articles of agre ment hitherto ready and willing that such part of th said slob or waste land as is opposite to the said esta of the plaintiffs, and bounded by the before-mentione canal on the one side, and by the said property of th said Mr. *Maxwell* on the other, and extending to the si of the said proposed embankment as laid down in th said Mr. *M'Neil*'s plan, should be allotted and given t the plaintiffs, and should be absolutely reserved to them

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nd their successors in and by the said intended act in he said articles of agreement mentioned; and that the aid allotment or proportion of the said slob or waste and so proposed to be allotted and given to the said R. O. should be allotted and given to him, and absolutely reserved to him and his heirs by the said intended act, according to the true intent and meaning of the said articles of agreement and memorandum: that they, the plaintiffs, had also always from the time of the making of the said articles of agreement, hitherto been ready and willing to receive and take the aforesaid proportion or allotment so agreed to be allotted and given and reserved to them, as in the said articles of agreement mentioned, of the slob or waste land in full of all rights and claims of the plaintiffs, and of all and every of their respective tenants claiming from or under them or him in respect of the said slob or waste land, and to protect and indemnify the defendants from and against any right or claim derived from or under the plaintiffs or their successors, which should or might be made by any of their respective tenants in, to or upon the said slob or waste land, or any part thereof, save and except as in the said articles of agreement mentioned, according to the true intent and meaning of the said articles of agreement; and that no such claim or demand had hitherto been made by the tenants of the said plaintiffs, or by any or either of such tenants, in, to or upon the said slob or waste land, or any part thereof.

Breach: that although, from the time of the making of the said articles and memorandum respectively, the plaintiffs had always well and truly observed, performed, fulfilled and kept the same in all things on their part and behalf to be observed, performed, fulfilled and kept; of all which premises the defendants before the commencement of the suit, and before and at the several times of the committing of the several

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breaches of promise by the defendants in that cou after mentioned, respectively had notice: yet the d fendants, disregarding their said promise in that beh after the said bill had been so settled, determined a agreed upon as aforesaid, according to the true int and meaning of the said articles of agreement, a before the said bill had passed the said House of Co mons, and during the said session in the said mem randum mentioned, to wit, on the 24th of *May* 18 and on divers other days and times between that d and the time of the said bill passing the said House Commons, did, without the consent and against t will of the plaintiffs and their solicitor, — of which t defendants then had notice, — cause and procure div powers and authorities, and divers clauses, pr visoes, restrictions and stipulations to be inserted a contained in the said bill, and certain proceedings take place thereupon, at the several times aforesa before the said committee of the House of Commo without the said last-mentioned powers and authoriti clauses, provisoes, restrictions and stipulations, or a or either of them, having been first agreed upon settled by the said plaintiffs, or their solicitors, or a other person on their behalf, and without the same any or either of them having been approved of, settl or determined by the said *P. B. B.*, according to t terms of the said agreement, although divers disput and differences then arose between the plaintiffs and t defendants respecting the same, and in framing and pe fecting the said bill in respect thereto: that such la mentioned powers and authorities, clauses, provisoes, r strictions and stipulations were not nor are, nor were n are, nor was nor is, any or either of them, in accordan with the said bill and the said powers and authoriti clauses, provisoes, restrictions and stipulations so settl and determined by the said *P. B B.* as aforesaid, a so agreed upon, determined and settled by and betwe

the plaintiffs and defendants and the said *R. O.* as thereinbefore mentioned, but contrary thereto, and to the true intent and meaning of the said articles of agreement and the promise of the defendants; and through and by means of such last-mentioned powers and authorities, clauses, provisoes, restrictions and stipulations, so caused to be inserted and contained in the said bill by the defendants as last aforesaid, the said allotment or proportion of the said slob or waste land so agreed to be allotted and given and reserved to the plaintiffs as aforesaid, was not so allotted, given or reserved in or by the said bill, to the plaintiffs and their successors, according to the true intent and meaning of the said articles of agreement and the said promise of the defendants: that, on the passing of the said intended act, and by reason of the premises last aforesaid, the said last-mentioned proportion or allotment of the said slob or waste land was not nor is absolutely reserved to the plaintiffs and their successors in and by the said act of parliament so made and passed as aforesaid, contrary to the said articles of agreement and promise of the defendants in that behalf, and in breach thereof; and the plaintiffs had thereby not only lost and been deprived of divers great profits, benefits and advantages, to wit, of the value of 1000*l.*, which they, the plaintiffs, might, and otherwise would, have derived and acquired from the said last-mentioned part of the said slob or waste land being so reserved to them as aforesaid, but, by means of the premises aforesaid, they, the plaintiffs, were and had been put to and occasioned, and forced and obliged to incur, and necessarily did incur and sustain, divers other costs, charges and expenses, to wit, amounting to the sum of 1300*l.*, in and about the endeavouring to procure the said part of the said slob or waste land so agreed to be allotted and given to the plaintiffs as aforesaid, to be absolutely reserved to them in and by the said intended

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act, according to the true intent and meaning of the said articles of agreement, and in accordance with the said bill so agreed upon, settled and determined, as thereinbefore mentioned.

Second breach: that the defendants did not nor would, nor did nor would any or either of them, or any persons or person on their behalf, on, or at any time after, the passing of the said act of parliament, pay or cause to be paid to the plaintiffs the said sum of 1000*l.* in the said articles of agreement and memorandum mentioned, or any part thereof, although a reasonable time for paying the same elapsed after the passing of the said act and before the commencement of this suit, and although the defendants were during that time, to wit, on the 1st of *September* 1838, and often afterwards, requested to pay the said sum of 1000*l.* in the said articles of agreement and memorandum mentioned, to the plaintiffs; but the defendants, to pay the same or any part thereof to the plaintiffs, had wholly neglected &c., and the last-mentioned sum of 1000*l.*, and every part thereof, still was and remained wholly due and owing, and in arrear and unpaid from the defendants to the plaintiffs.

Third breach: that the defendants had not at any time before or since the passing of the said act of parliament although often requested so to do after the making such default in payment of the last-mentioned sum of 1000*l.* as last aforesaid, to wit, on the 14th of *May* 1839, returned the said survey, plans and valuations in the said memorandum mentioned, and being of the value aforesaid, or any of them, to the plaintiffs; but the defendants to return the same or any of them to the plaintiffs had wholly neglected &c., and had kept and retained the same, contrary to their said promise.

Fourth breach: and that, although such reasonable costs and expenses were, at the request of the defendants, incurred, sustained and paid by the plain-

iffs, as thereinbefore mentioned, in using their best endeavours by petition and otherwise as aforesaid to promote the progress of the said bill so agreed, determined and settled by the plaintiffs and the said *R. O.* and the defendants as aforesaid, and to procure the same to be passed into an act of parliament as thereinbefore mentioned, to wit, to the amount of 1200*l.*; of which the defendants, after the passing of the said act of parliament, and before the commencement of this suit, to wit, on the 1st of *September* 1838, had notice; and although the defendants were then requested to pay the same, and a reasonable time for that purpose had thereafter and before the commencement of the suit elapsed; yet the defendants had not paid the said last-mentioned sum of money, or any part thereof, to the plaintiffs, or to any other person or persons, but had thitherto wholly neglected &c., and the same and every part thereof was still due and owing and unpaid by the defendants.

There was also a count upon an account stated.

The defendants severed in pleading, the defendant *Robertson* pleading *inter alia* as follows: —

Secondly, that the plaintiffs, at the time of the making of the said articles of agreement, and also of the said memorandum in the first count mentioned, were and still are a corporation aggregate, and which same corporation aggregate was then and still is called and known by the name of The Wardens and Commonalty of the Mistery of Fishmongers of the City of *London*; that the said articles of agreement and memorandum were not, nor was either of them, made or entered into by the plaintiffs by or under the common seal of the corporation; and that the said articles and memorandum were not, nor was either of them, made or entered into by any person for that purpose, duly authorised by any instrument in writing under the common seal of the said corporation. Verification.

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Thirdly, as to all the several breaches in count of the declaration above assigned — exc the breach above assigned, whereby it was alle the defendants had not returned the said surve valuations in the said first count mentioned plaintiffs, but had neglected and refused to re same, and had kept and retained the same, cor their said supposed promise, in manner and fo the said first count alleged and expressed — that bill in the said first count mentioned, so agre settled and determined as in the same count me was not as perfect and beneficial for the inter the said parties in the said first count mentione reclamation of the said slob or waste land in t count mentioned, as the same bill could be m cording to the true intent and meaning of articles of agreement and memorandum in th mentioned, *modo et formâ* : — concluding to the

Fourthly, as to all the several breaches in count of the declaration above assigned — exce the breach above assigned, whereby it was alle the defendants had not returned the said survey that the plaintiffs did not continually from time and at all times up to and until the time of pas act of parliament in the first count mentioned, reasonable means and endeavours to promote t gress of the said bill in the same count mentio to procure an act of parliament to pass thereupc *et formâ* : — concluding to the country.

Fifthly, as to all the said several breaches in count of the declaration above assigned — except breach above assigned, whereby it was alleged defendants had not returned the said survey, &c the plaintiffs had not, from the time of the ma the said articles of agreement and memorandu first count mentioned, always well or truly o

performed, fulfilled or kept the same in all things on their part and behalf to be observed, performed and fulfilled and kept in manner and form as the plaintiffs had above thereof in the first count alleged against the defendants; but on the contrary thereof amongst other things, they the plaintiffs, after the making of the articles of agreement and memorandum respectively, and before the said bill in the first count mentioned was passed or carried through parliament, or received the assent of our Sovereign Lady the Queen, or became an act of parliament, as in the first count mentioned (*a*), and before the said bill had been passed by the House of Lords, and whilst the said bill was in and was passing through the House of Lords, to wit, on the 18th of *June* 1838, did present a petition to the House of Lords, and did thereby petition the said House of Lords, against the preamble of the said bill, and against the passing of the said bill, contrary to the form and effect of the said articles of agreement and memorandum. Verification.

The defendant *Booth* pleaded, secondly, as to the first count, that the plaintiffs, at the time of the making of the articles of agreement and also of the memorandum in the first count mentioned, were and from thence have been and still were a corporation aggregate, and which corporation aggregate was then and still was called and known by the name of "The Wardens and Commonalty of the Mistery of Fishmongers of the City of *London*;" that the articles of agreement and memorandum and each of them were made concerning certain estates and interests in lands and tenements, and that the same articles and memorandum did not, nor did either of them, relate to or concern any trade or merchandise whatso-

(*a*) In the defendant *Booth*'s sixth plea the following words were here introduced, "And before any breach by the defendants of the promise of the defendants in that count mentioned."

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ever; that the articles of agreement and memorandu were not, nor were either of them, made or entered int by the plaintiffs by or under the common seal of th plaintiffs (so being such corporation as aforesaid); an the articles and memorandum were not, nor were eithe of them, made or entered into by any person for tha purpose duly authorised by any instrument in writin under the common seal of the plaintiffs so being suc corporation as aforesaid. Verification.

The second, third, fourth and fifth pleas, pleaded b the defendant *Booth*, were in substance the same as tho pleaded by the defendant *Robertson*.

The defendant *Staines* pleaded fourthly, to the whc of the first count, a plea similar to the fourth plea of t defendant *Robertson*.

Fifthly, to the first count; that the plaintiffs did n withdraw all opposition to the progress of the said b in that count mentioned, according to the true inte and meaning of the said articles of agreement and m morandum, *modo et formâ*: concluding to the country

Replication to the second plea of the defendant *Robe son*. The plaintiffs, not denying the matters stated the said second plea, for replication, nevertheless, sai that, before and at the times of the making and enterin into the said articles of agreement and memorandu respectively in the said first count mentioned, and whic on the faith of the defendants' said promise were s acted upon and performed by the plaintiffs on their pa as therein also mentioned, the said *J. D. T.* had bee and was the attorney and solicitor of the plaintiffs, ar had been and was employed by them, the plaintiffs, such solicitor and as the agent for them, and on the behalf, in and about the conduct and management of t

said opposition of the plaintiffs to the bringing in and passing of the said bill in the first count first above mentioned and referred to, and the supporting the said claims of the plaintiffs to, in, over and upon the said slob or waste land in the said articles of agreement mentioned, and also in and about the making and entering into the said articles of agreement and memorandum respectively; and that the said articles of agreement and memorandum were respectively made and entered into and consented to and approved of, as in the said first count mentioned, by the said *J. D. T.*, as such solicitor and agent as aforesaid, for and on behalf of the plaintiffs, and in the course and performance of his the said *J. D. T.*'s employment and duty as such solicitor and agent as aforesaid, and by and with the authority, consent and approbation of the plaintiffs, and of which the defendants, at the respective times of the making and entering into the said articles of agreement and memorandum respectively, had notice. Verification.

Special demurrer to the third plea of the defendant *Robertson*; assigning for causes, that the said third plea traversed, and attempted to put in issue, matter which was wholly immaterial to the merits of the case, and to the matters to which the same was pleaded; and that, if, as the said third plea must be taken to admit, the agreement and memorandum were made and entered into and fully performed by the plaintiffs on their part, and the disputed clauses and provisions were settled by Mr. *Brodie* as alleged in the first count, it was perfectly immaterial as to each and every of the breaches of contract charged in the first count, and to which the said third plea was pleaded, especially as to the nonpayment of the costs and the 1000*l.*, that the bill after it was settled and agreed upon, was not so beneficial as it might have been, as alleged in the said third plea; that

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it was material only that the differences should ha been settled by Mr. *Brodie;* that the said third pl shewed no default or failure of consideration on t part of the plaintiffs, nor any valid excuse or justific tion of the defendants' breaches of contract to whi the said third plea was pleaded, and did not even d close any grounds for a cross action against the pla tiffs; that it was not a matter contracted for by t agreement that the bill should be so beneficial as in t third plea mentioned; and that this defendant was his own argument, and by consenting to the bill, as a mitted by the pleas, precluded from now disputing t matters attempted to be put in issue by the said thi plea; and that, at most, the third plea could be answer, if at all, only to the first breach charged in t declaration; and that, if the third plea contained si ficient matter of defence (*) to the breaches of prom to which the same was pleaded, the same also wou amount to an answer and defence to the whole of t first count of the declaration; that the third plea i properly contained and was an answer and defence a further and other part of the first count of the d claration than was professed to be answered by the s third plea, that is to say, to the whole of the fi count; and, if judgment on the said third plea shou be given for the defendant, the court could not cc sistently give judgment for the plaintiffs, as to the matt excepted in the introductory part of such plea, a would be uncertain for whom judgment ought to given; and that the said third plea was in other r spects wholly immaterial, improper, and insufficient, & Joinder.

Special demurrer to the fourth plea of the defenda *Robertson;* assigning for causes, that the said plea te dered an issue which was wholly immaterial and insu ficient; that the portion of the agreement on the pa

of the plaintiffs, the partial breach whereof was alleged and relied upon by the said fourth plea, was not in the nature of a condition precedent to the performance of the defendant's part of the contract, but was an independent agreement; that it formed a part only of the consideration for the defendant's promise; that the breach of it might be compensated in damages, and afforded a ground only for a cross action, without being a defence in the present case: that the fourth plea admitted that the plaintiffs delivered over the survey, plans and valuations, withdrew their opposition to the introduction of the bill, and also presented a petition in its favour, and otherwise promoted it, withdrawing also, until the passing of the act, all opposition to its further progress, and that the defendants had had, and still had, the benefit of the said survey, plans and valuations, and had further obtained the advantage, by the plaintiffs' acts, of having been able to bring in their bill, and that there had been in other respects a partial performance of the contract on the part of the plaintiffs; and yet that the same fourth plea contained no sufficient answer or matter of defence as to the said breaches of contract in the first count of the declaration mentioned, and to which the said fourth plea was pleaded, or any of them, more especially as to the breach in nonpayment of the 1000*l.* which was to be paid at a specified time, and on account of the said survey, plans and valuations, which the defendants had actually enjoyed to their own use (*); that it was not in or by the fourth plea alleged that the defendants, or either of them, requested the plaintiffs to use any means or endeavours, or that the plaintiffs could have used any means or endeavours, to promote the progress of the bill, or that the defendants, or either of them, tendered or offered, or were or was ready or willing, to pay to the plaintiffs the expenses thereof, or that the plaintiffs had notice of

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the same; that if the said fourth plea contained sufficient matter of defence, &c. (Concluding as the demurrer to the third plea from the (*)) Joinder.

Special demurrer to the fifth plea of the defendant *Robertson*; (assigning similar causes to those assigned in the demurrer to the fourth plea down to the (*); and continuing thus;) that the said fifth plea did not sufficiently traverse or confess and avoid the matters to which the same was pleaded, or any of them; that the same plea amounted to and was an argumentative denial of the allegation contained in the first count, that the said plaintiffs did use all reasonable means and endeavours to promote the progress of the said bill, and to procure an act of parliament to pass thereupon, as therein alleged; that the said fifth plea amounted to and was an argumentative denial of the allegation contained in the first count, that the plaintiffs did withdraw all opposition of them, the plaintiffs, to the progress of the said bill, according to the true intent and meaning of the said articles of agreement and memorandum; that the plea improperly concluded with a verification, instead of to the country; that it was not alleged in the plea, that the petition therein mentioned was presented by the plaintiffs before any breach by the defendants of their said promise in the first count mentioned as to which the same plea was pleaded, nor did it sufficiently appear in or by the plea, at what time the plaintiffs presented the petition therein mentioned; that the plea did not sufficiently confess the breach of promise in the first count firstly above assigned, being a matter to which the plea was pleaded; and if the same is sufficiently confessed, then that it appeared by the first count, and was not denied by the plea, that the defendants broke their said promise as to the breach in the said first count firstly above assigned, and to which the plea was pleaded, before the bill had passed the House of Com

mons, and before the alleged breach of contract by the plaintiffs in the fifth plea mentioned and to which the same plea was pleaded; that from the said fifth plea, it appeared that the plaintiffs partially broke their contract as in that plea alleged, after such breach by the defendants of their said promise as last aforesaid; that, if the plea contained sufficient matter of defence, &c. (Concluding as the demurrer to the third plea from the (*)). Joinder.

The plaintiffs also replied and demurred in a similar manner to the pleas of the defendant *Booth*. Upon each demurrer there was a joinder in demurrer.

The plaintiffs also demurred to the fourth and fifth pleas respectively of the defendant *Staines*, assigning similar causes to those assigned in the demurrer to the fourth plea of the defendant *Robertson*, down to the (*). Joinder.

Rejoinder by the defendant *Robertson* to the replication to his second plea, that the plaintiffs, before and at the several times of the making and entering into the said articles of agreement and memorandum respectively in the said replication and first count mentioned, were and still are a corporation aggregate, and which same corporation was before and at the several times and still is called and known by the name of The Wardens and Commonalty of the Mistery of Fishmongers of the City of *London*; that the said bill in the said replication and first count respectively mentioned, and the said opposition to the bringing in and passing of the same bill in the replication and first count respectively mentioned, and also the said claims of the plaintiffs, and the said articles of agreement and memorandum also in the said replication and first count respectively mentioned, severally

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and respectively solely related to and concern estates and interests in lands and tenements, an nor did any or either of them relate to or co trade or merchandise whatsoever; that befo the said several times of the making and ent the said articles of agreement in the said replic first count respectively mentioned, the said pl parol only, and without and not by any inst writing under the common seal of the pla otherwise howsoever, appointed and employe *J. D. T.* as, and to be, the attorney and soli agent of them the plaintiffs, for them and in th in and about the conduct and management o opposition of the plaintiffs and the supportir said claims, and also in and about the makin tering into the said articles of agreement an randum respectively; that the said *J. D. T.*, of such parol appointment and employment o *J. D. T.* as aforesaid, and not otherwise, wa ployed by them, the plaintiffs, as such soli agent for them and on their behalf, in and conduct and management of the said oppositi plaintiffs to the bringing in and passing of the and the supporting the said claims, and als about the making and entering into the said agreement and memorandum respectively, as i replication mentioned; that the said *J. D. T.*, only, and without and not by any instrument i under the common seal of the plaintiffs, or seal of the said *J. D. T.*, made and entered consented to and approved of the said articles ment and memorandum respectively; that articles of agreement and memorandum wer tively made and entered into, and consented t proved of, by the said *J. D. T.*, as such soli agent, for and on behalf of the plaintiffs, an

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course and performance of his the said *J. D. T.*'s employment and duty as such solicitor and agent, as in the said replication mentioned, by virtue of the said *J. D. T.*'s so, by parol, and without and not by any such instrument in writing under the common seal of the plaintiffs, or under the seal of the said *J. D. T.* as aforesaid, so making and entering into, and consenting to, and approving of, the said articles of agreement and memorandum respectively, and under and by virtue and in pursuance of the said parol appointment and employment of him the said *J. D. T.* as aforesaid, and not otherwise, he the said *J. D. T.* having been so appointed and employed by parol only, and without, and not by, any instrument in writing under the common seal of the plaintiffs as aforesaid; that the plaintiffs by parol only, and without and not by any instrument in writing under the common seal of the plaintiffs, or otherwise howsoever, did authorise, and did consent to, and did approve of the said *J. D. T.* as such solicitor and agent (so appointed and employed by parol, and not otherwise, as aforesaid), for and on behalf of the plaintiffs, and in the course and performance of his, the said *J. D. T.*'s, employment and duty, as such solicitor and agent (so appointed, &c.), making and entering into, and consenting to, and approving of the said articles of agreement and memorandum respectively, in manner aforesaid; that the said articles of agreement and memorandum were respectively made and entered into, and consented to, and approved of, by the said *J. D. T.* as such solicitor and agent (so appointed, &c.), for and on behalf of the plaintiffs, and in the course and performance of his, the said *J. D. T.*'s, employment and duty as such solicitor and agent (so appointed, &c.), by and with the authority, consent and approbation of the plaintiffs, as in the said replication and therein-before mentioned

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and alleged, under and by virtue of the plaintiffs so by parol only, and without and not by any writing under the common seal of the plaintiffs or otherwise, howsoever, authorising and consenting to, and approving of the said *J. D. T.*, as such solicitor and agent, (so appointed, &c.), for and on behalf of the plaintiffs, and in the course and performance of his, the said *J. D. T.*'s employment and duty as such solicitor and agent (so appointed, &c.), so making and entering into, and consenting to, and approving of, the said articles of agreement and memorandum respectively, by parol only and without, and not by, any instrument under the said common seal of the said plaintiffs, or under the seal of the said *J. D. T.* as therein-before mentioned; WITHOUT THIS, that the said articles of agreement and memorandum were respectively made and entered into, and consented to, and approved of, as in the said replication and first count respectively mentioned and alleged, by the said *J. D. T.*, as such solicitor and agent as in the same replication mentioned and alleged, for and on behalf of the plaintiffs, and in the course of his, the said *J. D. T.*'s employment and duty as such solicitor and agent aforesaid, and by and with the authority, consent and approbation of the plaintiffs, *modo et formâ*:—concluding to the country.

The defendant *Booth* rejoined, that the articles of agreement and memorandum in the first count mentioned, were not, nor were either of them made or entered into, or consented to, or approved of, as in the replication and first count mentioned by the said *J. D. T.* as the attorney, solicitor, or agent of the plaintiffs by any instruments in writing under the common seal, or under the seal of the said *J. D.* by or with any authority, consent or approbation

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the plaintiffs in writing under their common seal. Verification. (*a*)

Special demurrer to the rejoinder of the defendant *Robertson*; assigning for causes, that the matters stated in the inducement in the rejoinder were wholly immaterial, and did not directly or indirectly deny, or confess and avoid, the last-mentioned replication of the plaintiffs, and the matters therein alleged; that, if it were material that the said *J. D. T.* should have been employed and appointed by an instrument under seal, and that the articles of agreement and memorandum should have been made and entered into, and consented to, and approved of, by an instrument under the common seal of the plaintiffs, or under the seal of the said *J. D. T.*, and that the authority, consent and appprobation for the said *J. D. T.*'s making and entering into, and consenting to, and approving of such articles of agreement and memorandum should have been by an instrument under the common seal of the plaintiffs, then that the said matters ought to have been pleaded by way of confession and avoidance; that the rejoinder improperly concluded with a traverse; that it improperly concluded to the country, and ought to have concluded with a verification; that the plaintiffs were, by the said rejoinder, precluded from relying upon a subsequent ratification of the articles of agreement and memorandum by the plaintiffs under their common seal; that, if the rejoinder were properly pleaded by way of traverse, then that the same ought to have further averred in the inducement thereof that the said articles of agreement and memorandum had not been ratified by the plaintiffs under their common seal; that, if the matters stated in the inducement to the rejoinder in any way traversed or denied matter set forth and alleged in the replication, the same amounted to

(*a*) Unnecessary, *antè*, Vol. I. 22. 816.

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and were a direct denial of the matter alleged or n sarily implied in such replication; that the induce and the matters therein stated ought to have beer contained an argumentative denial only of the mat the replication; that the rejoinder was impleade way of special traverse; that, if the matters afor stated in the inducement were material, then any c such matters would have been sufficient as a speci ducement to the rejoinder; that, by the insertion o several allegations and matters before mentioned rejoinder was double and multifarious; that the m stated and alleged in the inducement of the rejo ought to have been pleaded disjunctively, and not c latively; that if it were material and necessary tha said *J. D. T.* should have been appointed and emp by an instrument under seal, then the rejoinder in perly contained an argumentative and no direct d of such appointment and employment; that the rejo was also double, in avowing the appointment and em ment of the said *J. D. T.*, as well as the fact of the a ment and memorandum having been made, and en into, and consented to, and approved of, by him; tha rejoinder was a departure from the second plea o last named defendant, and the said last named defer by his said rejoinder attempted to vary and put in and, by the said inducement, directly to deny, the ar of agreement and memorandum in the first count tioned, and although the same had not been v questioned or denied by the last-named defendant i said second plea; that the construction and effect c agreement were matters for the consideration o Court, and could not be traversed as in the sai joinder was attempted; and that the said rejoinder fessed and admitted the matter of the last-ment replication of the plaintiffs, and was in other res immaterial, &c. Joinder.

Surrejoinder to the rejoinder of the defendant *Booth:* that, after the said articles of agreement and memorandum in the first count mentioned were respectively made and entered into, and consented to, and approved of, as in that count and also in the last-mentioned replication mentioned, and after the same had been so acted upon and performed by the plaintiffs upon the faith of the defendants' said promise, as in the first count also mentioned, and before the commencement of the suit, to wit, on the 9th of *May*, 1839, by a certain deed-poll under the common seal of the plaintiffs, as and being such corporation aggregate as aforesaid, then made and executed by the plaintiffs, — and which deed-poll the plaintiffs did recognise and adopt, — ratify and confirm the said articles of agreement and memorandum; and of which the defendants thereupon afterwards, and before the commencement of the suit, to wit, on the day and year last aforesaid, had notice. Verification, and profert.

Rebutter; setting out upon oyer the deed-poll mentioned in the surrejoinder. (Which deed-poll, reciting the agreement and memorandum declared on, witnessed that the said Wardens and Commonalty of the Mistery of Fishmongers of the City of *London* did thereby recognise and adopt the said articles of agreement, and the indorsement thereon, and all and every the acts done and performed, as well by the said *J. D. T.*, as by the *Irish*-estate committee of the said company in pursuance thereof, and did thereby ratify and confirm the said agreement and indorsement, and all such acts as aforesaid, and did thereby testify and declare that such agreement was entered into, and that such acts were done and performed, by the said *J. D. T.*, and by the said *Irish*-estate committee, not on his or their own behalf, but as the agent or agents of and for, or on behalf of, them, the said company; as witness their common seal thereto affixed, &c.) Averment: that the deed-poll mentioned

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in the surrejoinder was made under the comm
the plaintiffs long after the articles of agree
memorandum in the first count mentioned had
were respectively made and entered into and
to and approved of, as in that count mentio
long after the making of the supposed promi
first count mentioned, and long after the
times of the committing of the several breache
mise respectively in that count mentioned, and
the respective times of the accruing of the
causes of action in that count mentioned, to w
9th day of *May*, 1839. Verification.

Special demurrer; assigning for causes, tha
agreement and memorandum and promise by
fendants having been made by them and acted
performed by the plaintiffs on the faith thereo
wholly immaterial whether the same agreement
morandum were expressly ratified by the
under their common seal before or after the br
promise by the defendants; — that, if the matte
in the rebutter were material, then the same
taken to be, and were, a traverse of matter n
implied by the surrejoinder, namely, that the
was executed before the defendants' breaches of
and the rebutter ought to have concluded to th
instead of concluding with a verification; — that,
the rebutter admitted the agreement and mem
to have been acted upon and performed by the
on the faith of the defendants' promise before
poll was executed, yet it did not sufficiently co
the deed-poll was executed before the comm
of the suit; — that it did not deny, or sufficientl
the surrejoinder, or any of the matters stated
or sufficiently avoid the same; — and that the
was in other respects uncertain, &c. Joinder.

The case was argued in last *Trinity* term (M
27th, and *June* 1st) by

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Channell Serjt. (with whom was *Bovill*) for the plaintiffs. The first point intended to be raised by the defendants is that the plaintiffs, being a corporation aggregate, cannot sue upon a contract made by them which is not under their common seal; or, if the contract were made by their agent, that his appointment must not be shewn to be under seal. Assuming these to be correct, as general propositions, the question then is whether it is necessary to shew that the contract in this case was executed by the corporation at all, inasmuch as they have acted upon it, and have further ratified it, by now suing upon it.

The corporation having performed the agreement on their part, may enforce it against the defendants. It is not always necessary that a contract should be signed by both parties; a party who has not signed may, in cases where there is a good consideration, recover against the party who has; *Bowen* v. *Morris* (*a*), *Laythoarp* v. *Bryant* (*b*), *Kennaway* v. *Treleavan* (*c*). In the last case *Parke* J. observes — "There are a great number of cases of contracts not binding on both sides at the time when made, and in which the whole duty to be performed rests with *one* of the contracting parties." (*d*) In the present case it appears on the face of the declaration that the plaintiffs have performed their part of the contract, and that the defendants have had the benefit thereof; the contract therefore is binding on the latter, and no objection for want of mutuality can arise.

The recognition and adoption of the contract by the corporation are equivalent to a ratification, or to an original contract, under seal. In *De Grave* v. *The Mayor*

(*a*) 2 *Taunt.* 374.
(*b*) 2 *New Cases*, 735.; 3 *Scott*, 238.
(*c*) 5 *M. & W.* 498.
(*d*) The cases mentioned in the former branch of this sentence appear to be imperfect synallagmatic contracts, those in the second, perfect unilateral contracts.

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and Corporation of Monmouth (*a*) it was held that wh goods had been ordered by the mayor of a corporati and had been subsequently examined and approved at a full meeting of the corporate body, it was suc recognition of the contract as would make the corpo tion liable to pay for them, although the order was under the common seal. That case was referred to *Patteson* J. in giving the judgment of the court *Beverley* v. *The Lincoln Gas Light and Coke Company* (where his lordship observed — "The recognition o contract is its adoption—the taking it to be the contr of the party so recognising it." (*c*) So, in *Roe* d *The Dean and Chapter of Rochester* v. *Pierce* (*d*), wh a verbal notice to quit had been given by the steward the Dean and Chapter, *M'Donald* C. B. held it sufficient without any other evidence of his author His lordship added — "The Dean and Chapter, bringing the ejectment, shew that they authorised that they adopt this act." In *Marshall* v. *The Ma &c. of Queensborough* (*e*), *Leach* V. C. observed that, a regular corporate resolution passed for granting interest in a part of the corporate property, and, u the faith of that resolution expenditure was incurr he was inclined to think that both principle and thority would be found for compelling the corpo tion to make a legal grant in pursuance of t resolution." Again, in *Edwards* v. *The Grand Junct Railway Company* (*g*), where a person, acting on be of the subscribers to a railway, who were then solicit a bill in parliament for the purpose of forming th into an incorporated joint-stock company, entered i a contract with the trustees of a road, whereby it

(*a*) 4 *C. & P.* 111.
(*b*) 6 *A. & E.* 829.; 2 *N. & P.* 283.
(*c*) 6 *A. & E.* 843.
(*d*) 2 *Campb.* 96.
(*e*) 1 *Sim. & St.* 420.
(*g*) 1 *Mylne & Cr.* 650.

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stipulated, that, in consideration of the trustees withdrawing their opposition in parliament, and consenting to forego certain clauses of which they had intended to press for the insertion in the act, a formal instrument, to the effect of the clauses, should be executed under the seal of the company when incorporated, and the bill was accordingly allowed to pass unopposed and without the clauses, an injunction was granted at the suit of the trustees, to prevent the company from violating the provisions contained in the omitted clauses.

The principle that a subsequent ratification will give all legal qualities to a previous act was also recognised in *Whitehead* v. *Taylor* (*a*), *Robinson* v. *Gleadow* (*b*), *Maclean* v. *Dunn* (*c*), and *Yarborough* v. *The Bank of England.* (*d*) [*Maule* J. *The Mayor &c. of Carmarthen* v. *Lewis* (*e*) seems very like the present case. *Parke* B. there held that a corporation aggregate might maintain assumpsit for the use and occupation of tolls, although they did not grant the tolls to the occupier by any instrument under their common seal.] In *Smith* v. *The Birmingham and Staffordshire Gas Light Company* (*g*) the doctrine was carried much further, and it was held that a corporation was liable in *tort* for the tortious act of their agent, though not appointed by seal, if such act were an ordinary service, such as a distress professedly made under a statute for a debt due to the corporation; and that a jury might infer the agency from an adoption of the act by the corporation, as from their having received the proceeds of the seizure.

In the present case it appears, on the face of the de-

(*a*) 10 *A. & E.* 210.; 2 *P. & D.* 367.

(*b*) 2 *New Ca.* 156.; 2 *Scott*, 250.

(*c*) 4 *Bingh.* 722.; 1 *Moo. & P.* 761.

(*d*) 16 *East*, 6.

(*e*) 6 *C. & P.* 608. As to this case, see *antè*, Vol. II. 249. (*c*).

(*g*) 1 *A. & E.* 526.; 3 *N. & M.* 771.

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claration, that *Towse* was the agent to the plaintiffs for it is stated that the agreement was executed by him "for and on behalf of the plaintiffs. The second plea sets up the defence that the agreement was not made under the corporate seal or by any person authorised under seal; the replication is, that *Towse* was the solicitor and agent for the corporation employed by them as such agent in the conduct and management of the bill in parliament, and the agreement was entered into by him, as such solicitor and agent, on behalf of the corporation in the usual course of his employment. The rejoinder states that the appointment of *Towse* was by parol only, and not by an instrument under the corporate seal. The replication states the employment of *Towse* as agent to the company, and the making of the agreement by him, as such agent, more fully than the declaration. All the facts of adoption that are mentioned in the declaration are drawn down to the replication which sets up additional matter, namely that the agreement was entered into by the solicitor to the corporation in the course of his duty. The cases as to subsequent ratification, therefore, are applicable to the consideration of the replication. Upon this state of the record the defendant *Robertson* can only take such objections to the replication as would be admissible on general demurrer. And on general demurrer the replication would be good; as it must be taken that either the agreement itself, or the appointment of the agent, was under seal, if that be necessary to give validity to the agreement. In *The Dean and Chapter of Windsor* v. *Gover* (*a*), to debt for the rent of tithes, the defendant pleaded that he assigned the premises to one *J. B.*, and that the plaintiffs had notice of the assignment, and received rent from *J. B.* as their tenant;

(*a*) 2 *Wms. Saund.* 302.

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it was objected on the part of the plaintiffs that the plea was bad for not shewing that such acceptance was by deed under the common seal. "But to this it was answered that if a deed be necessary, it is implied in the plea; for an acceptance being pleaded, every thing that makes it to be a good acceptance is implied, for otherwise it is no acceptance at all." And several cases are there cited to the same effect — and others are collected in a note by Serjt. *Williams*. (*a*) So, in *Tilson* v. *The Warwick Gas Light Company* (*b*), which was an action of debt for work and labour against an incorporated company, *Bayley* J. said: "I think, that if a deed were necessary, we are justified, upon general demurrer, in presuming that there was such deed, and (in saying) that the neglect to set out the deed is mere matter of form;" and *Holroyd* J. expressed himself to the same purport.

The first point in this case is the same as that in *Arnold* v. *The Mayor of Poole* (*c*); and the cases there cited are authorities for the plaintiffs here; especially *Beverley* v. *The Lincoln Gas Light Company* (*d*), *Church* v. *The Imperial Gas Light and Coke Company* (*e*), *The Mayor, &c., of Ludlow* v. *Charlton* (*g*), *The Mayor, &c., of Stafford* v. *Till* (*h*), and *The Southwark Bridge Company* v. *Sills*. (*i*) These cases establish that, in reference to actions by or against corporations, there is no difference between *assumpsit* and *debt*, or between contracts executory and executed. It may be objected that this rule is applicable only to trading companies established under acts of parliament; but that observation will not

(*a*) 1 *Wms. Saund.* 305 *a.* n. (13).

(*b*) 4 *B. & C.* 962.; 7 *D. & R.* 376.

(*c*) *Antè*, Vol. IV. p. 860.

(*d*) 6 *A. & E.* 829.; 2 *N. & P.* 283.

(*e*) 6 *A. & E.* 846.; 3 *N. & P.* 35.

(*g*) 6 *M. & W.* 815.

(*h*) 4 *Bingh.* 75.; 12 *J. B. Moore*, 260.

(*i*) 2 *C. & P.* 371.

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apply to the cases of *The Mayor of Stafford* v. *Till* and *The Dean and Chapter of Rochester* v. *Pierce*. (*a*)

He then proceeded to argue that the rejoinder to the replication to the second plea by *Robertson* was bad, as being an informal special traverse of the allegation that the contract, or the appointment of the agent, was under seal. (The argument upon this point is not reported, as the judgment of the court proceeded upon other grounds. The learned serjeant cited *Stephen on Pleading* (*b*) and *Pearson* v. *Rogers*. (*c*)

The third plea is pleaded to all the breaches in the first count; and, unless it is an answer to each of the three breaches there set out, it is bad; *Gray* v. *Pindar*. (*d*) It is clearly no answer to the third breach for the non-payment of 1000*l*.; and that part of the plea which states that the bill was not as perfect and beneficial as it might have been made, is no answer to the declaration, since the declaration alleges that both parties were to be bound by the decision of the referee, and that he settled the bill.

The fourth plea, which is pleaded to the same breaches as the third, states that the plaintiffs did not continually use all reasonable endeavours to pass the bill. The plaintiffs in the declaration have alleged certain acts on their part to promote the bill. The language of this plea is consistent with the neglect to perform *some* only of the acts stipulated to be done; but, that would be a breach of the agreement affecting part only of the consideration; — such part not amounting to a condition precedent. The remedy for such breach would be by action. It would be like the case of the action on a covenant in a deed whereby the plaintiff conveyed an estate with the stock of negroes upon

(*a*) 1 *Campb.* 466.
(*b*) Page 207. 4th edit.
(*c*) 9 *A. & E.* 303.; 1 *P. & D.* 302.
(*d*) 2 *B. & P.* 427.

it; where a plea, that the plaintiff was not legally possessed of the negroes, was held bad, on the ground that otherwise the fact of any one negro not being the property of the plaintiff would bar the action. (a)

The fifth plea states that the plaintiffs presented a petition to the House of Lords in favour of other parties interested in the bill. That, however, would be no answer to this action; and the plea is open to the like objections as the fourth.

The pleas by the other defendants, *Booth* and *Staines*, raise substantially the same questions; and the same arguments are applicable to them.

R. V. Richards for the defendant *Robertson*. The main question is, whether it was competent for the plaintiffs, being a corporation, to enter into a contract not under seal; or whether they could take advantage of any contract made on their behalf by an agent whose appointment was not under seal. The agreement in question is one that affects the title to lands, and that fact makes an essential difference between this case and those principally relied upon on the other side. *The Mayor of Ludlow* v. *Charlton* (b) is an important authority against the plaintiffs. In that case, although there had been a formal entry of a resolution in the books authorising the contract attempted to be set off by the defendant, and although the contract had been executed, yet, as it affected lands of the corporation, it was held that it was invalid as not being under the corporate seal. [*Tindal* C. J. That would have been a very strong authority in the case of an action brought *against* these plaintiffs upon this agreement.] It is

(a) *Boone* v. *Eyre*, 1 *H. Bl.* 273. n.; 2 *W. Bl.* 1312.; cit. 6 *T. R.* 573. See also *Stavert* v. *Curling*, 3 *N. C.* 355.; 3 *Scott*, 740.; and 1 *Wms. Saund.* 320 *a. et seq.*; 2 *Smith, Lead. Ca.* 10. n.

(b) 6 *M. & W.* 815.

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equally strong here, since in every contract there m be mutuality. [*Maule* J. The contract here is ecuted. (*a*)] So it was in *The Mayor of Ludlow* v. *Ch ton.* [*Cresswell* J. Upon what ground is it that there m be mutuality in a contract? Is it not that there m be a good consideration? And have not the defend here got a good consideration?] It is submitted t they have not; for they never were in a situation to the corporation; and unless the corporation could sued in assumpsit, they cannot sue the defenda [*Maule* J. That is the very point in the case. other side do not contend that the corporation co have been sued.] This is an action on a precise contr and there is no case to shew that one party to suc contract has the power to sue, and not the other. [*T dal* C. J. An infant can sue on a promise of marri though he cannot be sued upon it. (*b*)] In that case contract is merely voidable and not void.

The necessities of modern times have introduced extension as to the liability of corporations; but relaxation of the ancient rule has obtained only favour of trading companies. None of the cases cit therefore, are applicable to the present. Neither do t more ancient exceptions apply; as this contract does n relate to matters of a trifling nature, or of constant c currence. This is a contract affecting the lands of t corporation. The general rule as to the nature of co tracts binding upon corporations is laid down in 1 *Bl Com.* 463. (*c*) and *Co. Litt.* 94. *b.* And in *Frevill* v. *E bancke* (*d*), it is said by *Coke* that no action lies at co mon law against a dean and chapter upon a prom made by them, because a corporation cannot be bou

(*a*) The plaintiffs did not declare upon the *executed* contract, but upon the antecedent *executory* contract; *post*, 172.

(*b*) See *Holt* v. *Clarencie* 2 *Stra.* 937.

(*c*) Citing *Davis*, 44, 4

(*d*) 1 *Roll. Rep.* 82.

without deed. If one party is not bound by a contract, the other is not. Unless, therefore, the court shall be prepared to overrule *The Mayor of Ludlow* v. *Charlton*, there is an end of this case.

The cases relied upon on the other side are distinguishable from the present. In *Bowen* v. *Morris* (*a*) the contract was entered into by a mayor on behalf of himself and the corporate body; and upon the question whether he could sue in his individual capacity, it was held that he could not. In *Laythoarp* v. *Bryant* (*b*), the question turned purely upon the construction of the statute of frauds, and had no reference to a contract by a corporation. The same remark applies to *Kennaway* v. *Treleavan*. (*c*)

Beverley v. *The Lincoln Gas Light Company* (*d*), *Church* v. *The Imperial Gas Light and Coke Company* (*e*), and that class of cases were all cases of trading companies, which have been introduced of late years by the legislature, for the purpose of trade alone; they are not corporations in the proper sense of the term. The sound reason why the general principle is not applicable to them will be found in the case of *Church* v. *The Imperial Gas Light and Coke Company*. *The Dean and Chapter of Rochester* v. *Pierce* (*g*), *The Mayor of Stafford* v. *Till* (*h*), and *The Mayor and Burgesses of Carmarthen* v. *Lewis* (*i*), were all actions for use and occupation, and were decided upon the grounds explained by Lord *Ellenborough* in the first mentioned case; namely, that an action for use and occupation under the statute 11 *G.* 2. *c.* 19. *s.* 14. does not imply a demise by deed. [*Maule* J. Those cases were decided upon the plea of non-as-

(*a*) 2 *Taunt.* 374.
(*b*) 2 *New. Ca.* 735.; 3 *Scott*, 238.
(*c*) 5 *M. & W.* 498.
(*d*) 6 *A. & E.* 829.; 2 *N. & P.* 283.
(*e*) 6 *A. & E.* 846.; 3 *N. & P.* 35.
(*g*) 1 *Campb.* 466.
(*h*) 4 *Bingh.* 75.; 12 *Moore*, 260.
(*i*) 6 *C. & P.* 608.

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sumpsit. In this case the plea is that there was no agreement. The declaration states an agreement; and if the plaintiffs could not agree, except by deed, that allegation in the declaration may be held, on general demurrer, to mean that the plaintiffs promised under seal; and if *Towse* agreed, and the plaintiffs afterwards under seal promised to perform the agreement, must not that now be taken to be a good consideration?] The declaration states an agreement *in writing;* and contains merely the averment of a promise on the part of the plaintiffs to perform *that* agreement. In *Roe dem. Dean and Chapter of Rochester* v. *Pierce* (*a*), the authority of the agent to give the notice to quit had been fully recognized by the corporation. *Marshall* v. *Queenborough* (*b*), and *Edwards* v. *The Grand Junction Railway Company* (*c*), shew that if parties are obliged to have recourse to a court of equity, it is because no relief is to be had at law. In *De Grave* v. *Monmouth* (*d*) the contract was for weights and measures, a small matter falling within the old recognized exception. And the consideration there was executed. It is contended, indeed, that the consideration in this case is executed but that is not so. The contract *declared upon* is executory; and although in subsequent averments it is alleged that the contract was performed, that will not alter the original nature of the contract. The subsequent ratification is matter of evidence; but it is clear that the original contract is executory.

The cases cited as to the ratification and adoption of the act of an agent have no application; for the present contract can only be ratified as an *executory* contract. In *Whitehead* v. *Taylor* (*e*), the point in question was as to the power of executors to ratify a distress for rent

(*a*) 2 *Campb.* 96.
(*b*) 1 *Sim. & St.* 420.
(*c*) 1 *Myl. & Craig,* 650.
(*d*) 4 *C. & P.* 111.
(*e*) 10 *A. & E.* 210.; 2 *P. & D.* 367.

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made in the name of the testator, and by his direction, but after his death; and the ratification was held good. Perhaps that case may be doubtful law; but at any rate it is very distinguishable from the present. The act had been authorised by the testator, and the ratification was after his death. [*Cresswell* J. It does not appear in that case that any positive act was done by the executor after the death of the testator.] In *Robinson* v. *Gleadow* (*a*), and *Maclean* v. *Dunn* (*b*), there was a sufficient legal ratification which would be drawn back to the previous contract; but that is not so here. [*Maule* J. Is not the bringing the action a sufficient ratification by the plaintiffs?] It is submitted that it is not, if both parties are not bound. The adoption must be of equal force, that is, equally binding on both parties. [*Maule* J. You say the plaintiffs are not bound; and that the defendants have no cross action against them; but the plaintiffs having brought the present action are bound on the record.] It is submitted that, after breach, the one party, not being bound, cannot by bringing an action bind the other party. Otherwise he might lie by for five years and three-quarters, just to avoid the operation of the statute of limitations, before the other party could know whether the contract was binding upon him. The cases of *Yarborough* v. *The Bank of England* (*c*) and *Smith* v. *The Birmingham and Staffordshire Gas Light Company* (*d*) have also no application. Those were actions in *tort*, where it was held that the jury might assume that the act of the agent was sufficiently the act of the principal to make the latter a *tort-feasor*. In *Tilson* v. *The Warwick Gas Light Company* (*e*) the first count was founded upon the obligation contained in the

(*a*) 2 *New Ca.* 156.; 2 *Scott*, 250.

(*b*) 4 *Bingh.* 722.; 1 *M.* & *P.* 761.

(*c*) 16 *East*, 6.

(*d*) 1 *A.* & *E.* 526.; 3 *N.* & *M.* 771.

(*e*) 4 *B.* & *C.* 962.; 7 *D.* & *R.* 376.

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act of parliament, under which the company was formed, that the costs of obtaining that act should be paid; the other counts were general *indebitatus* counts upon a debt which *might* have been founded upon a deed; and the court held that upon general demurrer, a deed might be presumed. In this case also it is argued that it may be presumed, the plaintiffs contracted by deed; but that will not be sufficient, inasmuch as one party cannot be bound by deed and the other by parol. [*Tindal* C. J. It would appear upon the whole record in this case that the promise was by simple contract. *Maule* J. Suppose a deed had been executed by the plaintiffs; and been signed but not sealed by the defendants, would the plaintiff have no remedy?] It would be very doubtful. [*Maule* J. I think there is a case in point in which assumpsit has been held to lie. *Manning* Serjt., for the defendant *Haines*, referred to *White* v. *Cuyler* (a). *Channell* Serjt. referred to *Sutherland* v. *Lishman*. (b)] Unless both parties were equally bound by the instrument, it is submitted that one could not sue the other. (c) [*Maule* J. In cases of demise, if the lessor executes the lease and the lessee does not, may not the latter be sued?] Not upon the lease. In *Cardwell* v. *Lucas* (d) the declaration in covenant stated that one *J. H.* was seised in fee, and being so seised, by a certain indenture, *with the consent and approval of the said J. H.* then given, made between the said *J. H.* of the one part, and the defendant of the other part, and, sealed with the seal of the defendant, it was witnessed, that, for the considerations therein mentioned, he the said *J. H.* did demise to the defendant, his executors and admini-

(a) 1 *Esp. N. P. C.* 200.; 6 *T. R.* 176.

(b) 3 *Esp. N. P. C.* 42.

(c) But see *Co. Litt.* 229. *a.* 231. *a.*; *Foster* v. *Massey*, *Cro. El.* 212.; *Clement* v. *Henley*, 2 *Roll. Ab. Faits* (F) pl. 2; *Com. Dig. Fait*, (C. 2.); *Cooch* v. *Goodman*, 2 *Q. B.* 580.

(d) 2 *M. & W.* 111.

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rators, certain premises therein mentioned: to hold to him, his executors, &c., for the term of eleven years; and that by virtue of that indenture, and by permission of the said *J. H.*, the defendant afterwards entered into the premises, and was possessed thereof: that *J. H.* afterwards made his will, by which he devised the estate to his widow *E.* for life, remainder to the plaintiff for life. It then averred the death of *J. H.*, and afterwards that of *E.*, and that thereupon the plaintiff became and was seised of the reversion of and in the premises, in his demesne as of freehold, for the term of his natural life, under and by virtue of the will. The defendant pleaded, in effect, that, although the deed was his deed, yet, that it was not signed by *J. H.*, or by any agent of the said *J. H.* thereunto lawfully authorised by writing, nor was any lease for the said term of eleven years put into writing and signed by *J. H.* or any agent, &c.; and it was held on demurrer, that the action was not maintainable by the plaintiff against the defendant for breaches of the covenants in the indenture. The declaration in this case states an agreement between the parties. If that is to be taken as an agreement by deed, then, if it were executed by the agent in his own name on behalf of his principal, it would be void as against the principal, and binding upon the agent alone; *Frontin* v. *Small* (*a*), *Appleton* v. *Binks* (*b*), *Burrell* v. *Jones* (*c*). [*Maule* J. referred to *The East India Company* v. *Lewis.* (*d*)]

Assuming that the corporation have not contracted under any instrument binding upon their corporate property, the question is whether, where a contract is binding on one party but not on the other, the party who is not bound can sue the other. The plaintiffs here, it

(*a*) 2 *Ld. Raym.* 1418.; 2 *Stra.* 705.
(*b*) 5 *East*, 148.
(*c*) 3 *B. & A.* 47. See also *Toplis* v. *Grane*, 5 *New Ca.* 636.; 7 *Scott*, 620.
(*d*) 3 *C. & P.* 358.

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is true, allege that they are bound, as part of the cor deration for the defendants' promise, but that allegat will not make them bound, if they are not so in l Mutuality is wanting in this case, and that is the esse of all contracts; *East London Waterworks Company Baily* (*a*), *Kingston* v. *Phelps* (*b*), *Biddell* v. *Dowse* (*Antram* v. *Chace* (*d*), *Ferrer* v. *Oven* (*e*), *Bird* v. *Hi ginson* (*g*). [*Maule* J. There is a large class of cas mentioned by *Pothier*, where one party, *A.*, promis to do something, if another party, *B.*, will do somethin else. This contract is not binding on *B.*; but if he do the act, then it becomes binding on *A.* (*h*) Perhaps it ma be contended that this is some such case.] Even if were so, still the mode of statement of the contract is n sufficient. There is no consideration moving from t plaintiffs to the defendants — no benefit from, or detr ment to the plaintiffs; and therefore they, being strange to the consideration, cannot sue upon the contrac *Lees* v. *Whitcomb.* (*i*) [*Maule* J. The declaratic there stated, as the consideration of the defendant's pr mise to remain with the plaintiff for two years, that t plaintiff would teach the defendant the business of dressmaker; but the contract proved contained no suc consideration. *Coltman* J. How do you make t

(*a*) 4 *Bingh.* 283.; 12 *Moo.* 532.

(*b*) *Peake, N. P. C.* 227.

(*c*) 6 *B.* & *C.* 256.; 9 *D.* & *R.* 404. reversing the judgment of C. P. in *Dowse* v. *Coxe*, 3 *Bingh.* 20.; 10 *Moo.* 272.

(*d*) 15 *East*, 209.

(*e*) 7 *B.* & *C.* 427.; 1 *M.* & *R.* 222.

(*g*) 2 *A.* & *E.* 695.; *S. C.* affirmed in *Cam. Scacc.* 6 *A.* & *E.* 824.

(*h*) See *Pothier, Traité des Obligations*, Part. 2. Chap. 3. A contract or obligation of this kind is termed *conditional*, *i.* an obligation which is s pended by the condition un which it has been contract and which is not yet acco plished; (*Poth. Traité des ligations*, No. 198.)

The particular condit mentioned above by the lear judge is termed *potestative*, i one which is in the power him towards whom the obli tion is contracted; (*Poth. Tr des Obligations*, No. 201.).

(*i*) 5 *Bingh.* 34.; 2 *M.* & 86.

plaintiffs strangers to the consideration?] Because they are not bound. *Bates* v. *Cort* (*a*) also shows the necessity for mutuality in a contract. [*Cresswell* J. That case and others of a similar kind resolve themselves into a question of *nudum pactum*. The point here is, as put by my brother *Maule*, of an executory contract, where one party undertakes to do one thing, if the other will do another.] It comes back to the fact of there being no binding contract. *Saunderson* v. *Griffiths* (*b*) is an authority to shew that a subsequent ratification by one who was not a party to the original agreement, is not sufficient.

If the action is maintainable at all, *Ogilby*, who by the agreement was to do something as well as the other parties, ought to have been made a co-plaintiff; *Chanter* v. *Leese* (*c*); for no action could have been maintained upon the agreement, if *Ogilby* had not performed his part.

As to the replication to the second pleas; if there is any weight in the argument that the company cannot bind themselves except under the corporate seal, then, unless the appointment of *Towse* were under seal, he could have no valid authority, as their agent, to enter into the contract; and the replication, not showing any such authority, is clearly bad.

He then proceeded to argue that, assuming the replication were good, the rejoinder was not open to the objection that had been urged against it. (*d*) Upon this point he cited *Gough* v. *Bryan* (*e*), *Stephen on Pleading*, 201, and *Cross Keys Bridge Company* v. *Rawlings* (*g*).

The third, fourth and fifth pleas may be dealt with

(*a*) 2 *B. & C.* 474.; 3 *D. & R.* 676.

(*b*) 5 *B. & C.* 909.; 8 *D. & R.* 648.

(*c*) 4 *M. & W.* 295.; affirmed in *Cam. Scac.* 5 *M. & W.* 698.

(*d*) *Vide antè*, p. 167.

(*e*) 2 *M. & W.* 770.

(*g*) 3 *New Ca.* 71.; 3 *Scott*, 400.

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together; they all contain the exceptions as to the breach for the non-return of the plans. The defendant contends that, by the agreement, he is entitled to the benefit of the entire consideration. There is no analogy between this case, an action of *assumpsit*, and an action of *covenant*, where no consideration is necessary; such as *Boone* v. *Eyre* (*a*) and *Stavers* v. *Curling*. (*b*) In simple contract the consideration must be laid and proved. The consideration here is laid as executory, not as executed. The exertions of the plaintiffs in favour of the bill are the consideration for the defendant to enter into the contract. If the plaintiffs did not use all reasonable means and endeavours to procure the bill to pass, as alleged in the fourth plea — or, if they presented a petition against the bill, as alleged in the fifth—the consideration for the defendant's promise would fail.

Hindmarch, for the defendant *Booth*. The plaintiffs were never bound by the agreement, it not being under seal. If any agreement under the seal of the plaintiffs could be implied, it would be a deed made between the three parties to the agreement, and of course it would be the deed of each; for it would not be presumed that there was a deed on the one side and a parol contract on the other. If the real cause of action arose on contract by deed, a parol promise to perform that contract would not sustain assumpsit; *Baber* v. *Harris* (*c*) and, therefore, if a deed were to be presumed in this case, the action would not lie. The allegation as to the memorandum indorsed on the articles of agreement, does not state that such memorandum was an agreement, or that it was made by any one. It merely states that it was *signed* by *Pearce* as solicitor of the defendants: this excludes the possibility of its having been executed under seal. If, therefore, the articles of agreement are taken

(*a*) 1 *H. Bl.* 273. n.; 2 *W. Blac.* 1312.

(*b*) 3 *New Ca.* 355.; 3 *Scott* 740.

(*c*) 9 *A. & E.* 532.

to be by deed, that agreement cannot be varied by parol. Assuming the contract to be void in its inception for the reasons already suggested, it could not be made good by any thing done afterwards, except by the consent of the party charged. The plaintiffs cannot elect, after breach, to make the defendants wrongdoers by relation.

As to the necessity of the contract being by deed, in order to bind the plaintiff, he cited *Horne* v. *Ivy* (*a*), *Panel* v. *Moore* (*b*), *Rex* v. *The City of Chester* (*c*), *Cary* v. *Matthews* (*d*), *Smith* v. *The Birmingham and Staffordshire Gas Light Company* (*e*), *Jenkins's Centuries, case* 68. (*g*), and *Dumper* v. *Syms* (*h*); and upon the point of want of mutuality, *Sykes* v. *Dixon* (*i*), *Daniel* v. *Bowles* (*k*), *Harrison* v. *Cage* (*l*), *Cole* v. *Cottingham* (*m*), *Cooke* v. *Oxley* (*n*), and *Payne* v. *Cave.* (*o*) The plaintiffs ought, at least, to have alleged notice to the defendant that they adopted the contract; *M'Iver* v. *Richardson.* (*p*) He also cited *Cardwell* v. *Lucas* (*q*), *Saunderson* v. *Griffiths* (*r*), *Richardson* v. *Gifford* (*s*), and *Wilson* v. *Woolfreys.* (*t*)

The cases cited on the part of the plaintiffs, which turn upon the statute of frauds, are inapplicable. Before that statute such contracts as are mentioned in those cases would have been binding on both parties although not in writing. The statute altered the law by requiring that such agreements should be in writing and signed by the party to be charged; but as to the other party, whose concurrence forms the consideration, the statute does not require his signature. (*u*) The consideration in such

(*a*) 1 *Vent.* 47.; 1 *Sid.* 441.; 1 *Mod.* 18.; 2 *Keb.* 567. 604.
(*b*) *Plowd.* 91.
(*c*) 2 *Show.* 366.
(*d*) 1 *Salk.* 191.
(*e*) 1 *A. & E.* 526.; 3 *N. & M.* 771.
(*g*) *Page* 131.
(*h*) *Cro. Eliz.* 815.
(*i*) 9 *A. & E.* 693.; 1 *P. & D.* 463.
(*k*) 2 *C. & P.* 553.
(*l*) 1 *Ld. Raym.* 386.
(*m*) 8 *C. & P* 75.
(*n*) 3 *T. R.* 653.
(*o*) 3 *T. R.* 148.
(*p*) 1 *M. & S.* 557.
(*q*) 2 *M. & W.* 111.
(*r*) 5 *B. & C.* 909.; 8 *D. & R.* 643.
(*s*) 1 *A & E.* 52.; 3 *N. & M.* 325.
(*t*) 6 *M. & S.* 341.
(*u*) *Vide tamen*, Vol. II. 462.

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cases remains the same as at common law. The statut[illegible] says nothing as to a seal; but by common law a co[illegible] poration can only bind themselves by seal and witho[illegible] their seal to a contract the other party has no conside[illegible] ation. The questions here are, 1st, whether all the pa[illegible] ties were originally bound by this contract, and 2dly if the plaintiffs were bound whether *assumpsit* will lie at their suit. [*Maule* J. There are cases which shew, that though a contract be signed by one party only, it may be enforced by the other. (*a*)] That arises from the express words of the statute (*b*), which require that a memorandum of certain contracts shall be signed by the party *to be charged* therewith. The statute merely says in effect that there shall be no evidence of such a contract, except by such a memorandum. [*Cresswell* J. The contract cannot otherwise be enforced. What is the value of that as a consideration which cannot be enforced?] The other party in such a case may not avail himself of the power which the statute gives him to avoid the contract which is only voidable: but in the present case the contract on the part of the plaintiffs is altogether void, and therefore it is also void as against the defendants. The cases upon the statute of frauds in fact turn upon the express words of the statute; but here the contract was at the common law void *ab initio*. The agreement set out in the declaration was made between three parties; the consideration for the alleged promise is stated to be, that the plaintiffs would perform their part of the agreement; but it should have been, that the plaintiffs and *Ogilby* would perform their parts respectively. The second plea, which is not demurred to as amounting to the general issue, says, in effect, that the defendant has never had any consideration.

The surrejoinder, which sets forth a ratification of the

(*a*) See *Egerton* v. *Mathews*, 6 *East*, 307.; 2 *Smith R.* 389. *Allen* v. *Bennett*, 3 *Taunt.* 169. *Martin* v. *Mitchell*, 2 *Jac. & W.* 426.

(*b*) 29 *Car.* 2. *c.* 3.

contract by deed poll on the part of the plaintiffs, is bad, as a departure both from the declaration and the replication. [*Coltman* J. The defendant has not demurred specially upon that ground.] It was not necessary, as departure is matter of substance, and may be taken advantage of upon general demurrer; 2 *Wms. Saund.* 84. *d.* (*n.*); *Palmer* v. *Stone.* (*a*)

Manning Serjt. for the defendant *Staines.* The pleas are good in two points of view. Either they traverse that which amounts to a condition precedent to the defendant's promise; or, if the facts stated do not amount to a condition precedent, they form, at least, part of the entire consideration; and the promise being founded upon the entire consideration, if part thereof fails, the promise also fails.

The declaration alleges the presentation of a petition to parliament by the defendants which was opposed by the plaintiffs; it then states the agreement, according to which the plaintiffs were to withdraw all opposition. The fifth plea of the defendant *Staines* alleges that the plaintiffs did not withdraw all opposition. It is admitted by the demurrer of the plaintiffs, that the opposition continues; then the substance of the promise, namely, the withdrawal of the opposition, fails. The opposition not having been withdrawn, the 1000*l.* is not payable by the defendants. The fifth plea, therefore, contains an answer to the whole declaration. [*Maule* J. Are the defendants entitled to keep the plans?] The agreement is, that if the opposition is withdrawn the defendants are to pay 1000*l.*, and, upon payment of that sum, are to keep the plans. The plaintiffs may perhaps say that the defendants' title to the plans, which depends upon the payment of the 1000*l.*, is abandoned. [*Tindal* C. J. You need not put it so broadly. It will be enough for

(*a*) 2 *Wils.* 96

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you to contend that the plaintiffs cannot recov this form of action. *Channell* Serjt. then prayed fo obtained leave to amend, by withdrawing the den to the fifth plea and taking issue thereon, upon pa of costs.]

The fourth plea stands upon the same footing fifth; it being a condition precedent that the pl shall take all means to promote the bill.

The declaration is bad, as showing a parol co of a corporation who can only express their w deed. The ancient doctrine is recognised in *Mayor of Ludlow* v. *Charlton* (*a*). The principle lished in *Yarborough* v. *The Bank of England* (*b* a corporation is liable in *trover*, is as old as a case *vile* (*c*). Several objections to the general rule, corporation must act by deed, are collected i *Abr.* tit. *Corporations et Capacities*; but they no application to the present case. (The l serjeant referred in particular to pl. 14 (*d*),

(*a*) 6 *M. & W.* 816.

(*b*) 16 *East*, 6.

(*c*) Pa. 20. Case 50. "Action upon the case brought by one —— against the corporation and company of ——, in *London*. And he counted that he was possessed of 100*l. in pecuniis numeratis*, and so possessed *casualiter amisit*; and they came to the hands of the defendants, who having notice thereof converted them to their own use. * * * *. *Fleetwood* Serjt. How can a corporation receive notice (*prendra notice*), being a body politic? *Manwood*. Well, by their solicitor and counsel; and they by them, under their instrument *under their seal*, do all things touching their corporations."

(*d*) "Covenant was brought by the mayor and comi of *N.* against the may commonalty of *D.*; a counted, that the defen their deed had covenan the plaintiffs should be murage, pontage, cust toll, in *D.* of all those and that they had taken certain of their burge certain of the burgesses to the wrong, &c.; and was adjudged that a ta the common servant (*m* is a taking by the corp and therefore the coven broken. *Quod nota*; was not pleaded there the servant was servant cialty under the comm of the corporation, or *E* 3. 17."

(*e*) "Error * * * *Pe*

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l (*a*), 53 (*b*) and 56. (*c*) It has been argued from the ses decided under the statute of frauds that it is suf- ient that the contract should be signed by the party arged; but those cases depend upon the positive de- aration of the statute; which does not import any new octrine as to the effect of the contract. If *A.* wishes purchase a horse, and draws up and signs a contract writing, and the vendor takes time to consider the atter, and the horse dies before the contract is com- leted, the vendor has no right of action. So, if *A.* roposes to buy a horse from a corporation and exe- utes a deed of purchase, and the corporation say they

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ustice, the election of dean, master, *et hujusmodi*, and the making of their attorney, which are of record, are good without writing under the common seal; but in a feoffment to a dean and chapter, they cannot take but by letter of attorney, under seal; and if I disseise one to the use of a dean and chapter, they cannot agree but by writing. * * * * 14 *H.* 8. 2, 29."

(*a*) "A man may justify as bailiff to a dean and chapter, *et hujusmodi*, a thing which appertains to his office, without showing the deed making him bailiff; for it is to the use of the corporation, and as their servant; but an interest cannot depart from a corporation, as a lease for years, a licence to take trees, or to be an attorney to make livery of seisin, *et hujusmodi*, without deed; for that ought to be by deed. 12 *H.* 7. 25, 26."

(*b*) "Debt against the provost and scholars of a college in Cambridge, *eo quod T. M. nuper præpositus*, and predecessor of the defendant, and the scholars, by *F.* their servant, purchased two bells of the plaintiff for 40*l.* here at *London*, where the action is brought; which came *ad usum et proficuum collegii prædicti*; and afterwards *T. M.* was removed from the provostry, and the defendant *fuit electus et præfectus*; and the defendant, *sæpius requisitus*, did not pay. And, by some justices, the purchase of the provost and the contract cannot be good; nor by abbot and convent, dean and chapter, husband and wife; for it is only the purchase of the dean, provost, abbot or husband; for the others shall not be but as dead persons in the law; and by some justices, the contract is good, and shall be intended the bargain only of the provost, and the name of the scholars is but surplusage; for the contract of the provost, and the sale to the use of the college, is the effect of the matter. 5 *E.* 4. (*Longo Quinto*) 70."

(*c*) *Vide antè*, Vol. IV. p. 876. n. (*d*).

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will consider the matter, or even, by parol, agree to accept the contract, and the horse dies, they cannot sue the purchaser. [*Tindal* C. J. But that is not quite the present case. The plaintiffs here say that *the horse has* been delivered. You contend that even then they would have only an *equitable* right.] The argument on the part of the plaintiffs upon this point is that, since the promise of the defendants, the consideration has been performed by the plaintiffs, and that therefore they are entitled to sue; but that consequence does not follow. In *Jackson* v. *Cobbin* (*a*) the declaration stated, in substance, that the defendant agreed to let, and the plaintiff agreed to take, a certain messuage and premises on certain specified terms, and that *afterwards*, in consideration of the premises, and that the plaintiff, at the request of the defendant, *had promised* the defendant to perform his part of the agreement, and that he then had power to let the messuage and premises to the plaintiff, without restriction as to the purpose for which the same should be used and occupied; and it was held, on special demurrer, that the consideration alleged was insufficient to sustain the promise. The corporation here are not bound by the original contract; and the performance by them does not alter the state of things. The cases where a corporation has been held entitled to sue for use and occupation, are also very distinguishable. Where an act consists merely of nonfeasance or permission on the part of a corporation, a seal is not necessary. It is not necessary in such actions to shew any contract. This arises from the express language of the statute 11 *G.* 2. *c.* 19.; but the principle is of much greater antiquity. It has been argued on the other side that the consideration here is *executed;* but if so a precedent request by the defendants should have been averred. (*b*)

(*a*) 8 *M.* & *W.* 790.

(*b*) See 1 *Wms. Saund.* 26 n. (1).

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The declaration is also bad in this respect—the contract is stated to have been made, not between the defendants and the corporation, but between the defendants and *Towse*. The contract therefore is not that of the corporation. Where *A.* contracts on the part of *B.* it is *A.* who contracts, and not *B.* [*Cresswell* J. That is, where *A.* contracts to do some act. But does *Towse* so undertake in this case?] There may be a contract by *A.* that *B.* shall do an act. [*Maule* J. Supposing that *Towse* was himself bound and not the corporation, yet the declaration says that, in consideration of the premises and that the plaintiffs would do certain things, the defendants promised to do certain things; this therefore is a new contract.] The consideration is that the plaintiffs would perform the things on their part and behalf to be performed. [*Maule* J. That would mean the things which *Towse* had undertaken they should perform.] It is submitted, it must mean the things they had themselves undertaken to perform.

Ogilby should have been made a co-plaintiff, the joint consideration being that the plaintiffs and *Ogilby* would withdraw their opposition to the bill. [*Tindal* C. J. Is not that objection got rid of by the allegation in the declaration that "*Ogilby* opposed the bill separately and apart from the plaintiffs, and on his own behalf?" How could he join with the plaintiffs in an action where there was no joint interest?] They have a *legal* joint interest—the consideration being their joint undertaking. [*Maule* J. Is it not competent for *C.* to promise *A.* to do something, in consideration of something to be done by *A.* and *B.*? Upon demurrer we must presume an *express* promise.] But the contract here is between *A.* and *B.* on the one side and *C.* on the other; the action therefore will not lie by *A.* alone. [*Tindal* C. J. The consideration moves from two parties, and the promise is made to one.] It is submitted the original promise is made to both, and then a new promise to one is alleged, but without

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any new consideration. At all events a performance by *Ogilby* ought to have been averred.

Another objection is, that the agreement was illegal. Where part of the consideration is illegal, a promise founded thereon cannot be enforced. The act of parliament in respect of which the agreement was made, is a public act, affecting the Crown and the rights of the subject; and therefore an agreement to take money for abstaining from opposing such is an illegal act, as being contrary to public policy; and it is therefore void. [*Cresswell* J. Why is it illegal to take money to do something for the *benefit* of the public? This measure is stated to be so in the act of parliament. *Tindal* C. J. This is not like a public act regulating the state of the nation. It is made public for judicial purposes only.]

Channell Serjt. in reply. The argument on the part of the plaintiffs—that if a contract under seal is necessary it may be assumed upon general demurrer that the contract here was so — has been answered on the other side, by saying that the same rule must be taken to apply to the promise by the defendants, and in that case assumpsit would not lie. But if the agreement were drawn up in writing and sealed and delivered by the plaintiffs, and merely signed by the defendants, it would constitute a binding contract. The allegation therefore in the declaration, that an *agreement* was made, will raise the inference that it was properly made—that is, under seal on the part of the plaintiff, and by parol on the part of the defendants. *The Mayor of Stafford* v. *Till* and that class of cases, proceeded, not upon the principle that a seal was unnecessary, but, assuming that to be so as a general rule, that something else had been done, which gave the parties a right of action. In *The Southwark Bridge Company* v. *Sills* (*a*), which was an action

(*a*) 2 *C. & P.* 371.

for use and occupation, the contract was made out by a series of letters. In all these cases the corporation had either itself acted upon the contract, or allowed the other party to do so. And either way the courts must have determined that a corporation was in a situation to receive a promise, though not under seal from another party. It can make no difference whether a corporation lies by and allows the other parties to take advantage of a contract, or assists them to do so.

It is admitted that there must be mutuality in a contract. But that means merely that the one party shall not be bound, unless there be a consideration moving from the other. The consideration here is, that the plaintiffs would perform certain acts — as in *Rose* v. *Sims* (*a*) it was that the bankrupt would accept and deliver a bill to the defendant; and the declaration here alleges an entire performance on the part of the plaintiffs, and the non-performance by the defendants. And although the performance by the plaintiffs may be somewhat inartificially stated, yet enough is alleged to give a right of action, and that is sufficient upon general demurrer. The case cited from *Bro. Abr.* tit. *Corporations et Capacities*, pl. 53. (*b*) is a strong authority for the plaintiffs.

As to the non-joinder of *Ogilby*. Even in the case of a joint contract, where the interests of the parties are several, they may maintain separate actions; *Eccleston* v. *Clipsham* (*c*), and the authorities cited in Serjt. *William*'s note (*d*). This principle was recognised in *Lane* v. *Drinkwater* (*e*), though it was held that the covenant there sued upon was joint. It is clear that in the present case the plaintiffs and *Ogilby* had separate interests

(*a*) 1 *B. & Ad.* 521.
(*b*) *Ante*, 163. (*a*).
(*c*) 1 *Saund.* 153.; 2 *Keb.* 338. 347. 385.
(*d*) 1 *Wms. Saund.* 154. n. (1).
(*e*) 1 *C. M. & R.* 599.; 3 *Dowl. P. C.* 223.

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in the land. This is a contract between three parties, but mutual promises between all are not alleged. The promise alleged on the part of the defendants is to do all the acts that concerned the interest of the plaintiffs.

It is said that the contract was with *Towse*, and not with the plaintiffs. It may be admitted that if he had contracted that the plaintiffs would *do* some act, the contract would be one on his part; but it is here stated that the agreement was made by him for and on behalf of the plaintiffs. But this point may be considered as already disposed of by what has fallen from the court.

It has been argued that the agreement was illegal, because money was to be taken to ensure the passing of the bill; but the bill proposed to interfere with the rights of the plaintiffs; besides which, nothing was to be done without the assent of the legislature.

The second plea, by *Robertson*, does not exclude the fact of there having been a ratification under seal. [*Coleman* J. It says that the agreement and memorandum were not made by any person "duly authorised" under seal. That averment, perhaps, may be considered as excluding a ratification under seal.] The point, however, is immaterial if the allegation of performance by the plaintiffs is sufficient. The other side have not pretended to argue, that if the contract was under seal, the third, fourth and fifth pleas contain any answer to the action.

The same remarks apply to the pleas by *Booth* and *Staines*.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

In this action, the plaintiffs, the *Fishmongers'* Company, demurred specially to the pleas of the defendant *Robertson*, put in by him thirdly, fourthly and fifthly, to the first count of the declaration; and they also demurred specially to the rejoinder of *Robertson*, by

him put in to the plaintiffs' replication to the second plea. But, as the principal question argued before us arose upon the declaration, the defendants contending that no action was maintainable by a corporation aggregate upon a contract not being under seal, it will be more convenient to consider that question, and the validity of the objections raised against the declaration, in the first instance, and afterwards to discuss and determine the several points which have been raised upon the subsequent pleadings upon this record.

The declaration stated, by way of inducement, that the defendants in the action had presented a petition to the House of Commons for a bill for draining and reclaiming certain slob or waste land in *Ireland*, the introduction of which bill was opposed by the plaintiffs, and also by one *Ogilby*, on his own behalf; and that, by an agreement made on the 17th of *March* 1838, "between *J. D. Towse*, on behalf of the plaintiffs" of the first part; one *Kensit*, on behalf of *Ogilby*, of the second part, and the defendants of the third part, for preventing expense and settling rights, it was agreed that the plaintiffs and *Ogilby* should respectively withdraw all opposition to the further progress of the bill; that the powers and clauses to be inserted in the act, should be agreed and settled by the solicitors, in order that the bill might be as perfect and beneficial to all parties as it could be made, and that any disputes should be settled by Mr. *Brodie*, whose determination was to be final; that the plaintiffs and *Ogilby* respectively should use all reasonable means and endeavours to promote the progress of the bill, and procure an act of parliament to pass thereupon; that part of the slob should be allotted and given to the plaintiffs, and a proportion of the slob allotted and given to *Ogilby*; that such allotments should be absolutely reserved in the act to the plaintiffs and *Ogilby* respectively, free of expense of draining, &c.;

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that the defendants would, on the passing of the act, pay the plaintiffs 1000*l.*; that the defendants would pay all costs of and attendant upon the application for and obtaining the act; that the allotments should be taken by the plaintiffs and *Ogilby*, in full of all rights; and that they would indemnify the defendants against claims of tenants, &c. And the declaration then set out a certain memorandum indorsed upon the said agreement, and of the same date therewith, by and with the consent and approbation of all the parties, and signed by *J. M. Pearce*, as solicitor and agent of the defendants, by which it was declared to be understood, that the plaintiffs and *Ogilby* were severally and jointly bound; that the 1000*l.* was to be paid to the plaintiffs for certain expenses incurred by them, partly in a survey and for certain plans, &c., which the defendants were to have the benefit of, but that the plans &c. were to be forthwith returned to the plaintiffs if the 1000*l.* was not paid; and that the agreement was to be in force only for the session 1837, 1838. And the declaration then proceeded to state, that, in consideration of the said agreement and memorandum, and of the premises, and that the plaintiffs would perform the same on their part the defendants promised to perform the same on their part so far as concerned the interest of the plaintiffs. The declaration then proceeded to aver, that the plaintiffs had, on the faith of the defendants' promise, delivered the survey, plans and valuations, and that the defendants had had the benefit thereof; that the plaintiffs had withdrawn all opposition to the introduction of the bill, and that *Ogilby* had done the same, and to allege in like manner a particular performance of each of the matters and things specified in the said agreement, which, according to the plaintiffs' construction, amounted to conditions precedent to be performed by the plaintiffs, concluding with a general averment of performance by

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the plaintiffs, and notice thereof to the defendants. And the declaration then stated, as breaches of the agreement on the part of the defendants, first, that, before the bill passed the House of Commons, the defendants had, without the consent of the plaintiffs, caused certain powers and clauses to be inserted without their having been first agreed upon or settled in the manner specified in the agreement; secondly, that the defendants had not paid the sum of 1000*l.* mentioned in the agreement, although a reasonable time had elapsed, and they had been requested so to do; thirdly, that the defendants had not returned the survey, plans and valuations, but had kept the same; and, lastly, that the defendants had not paid the costs incurred in prosecuting the bill at their request, although they had notice thereof, and were requested so to do. The declaration also contained a count on an account stated.

Upon the present state of the pleadings, the defendant *Robertson* has, undoubtedly the right to raise any objection to the declaration which could have been made available on a general demurrer thereto; and it has accordingly been contended, on his behalf, that it may be assumed, from the declaration itself, that the contract upon which this action is brought, was not sealed on the part of the plaintiffs with the common seal of the corporation; that, by the general rule of law, the plaintiffs, being a body corporate, cannot bind themselves by an agreement which is not under their common seal; that, although there are certain admitted and well-known exceptions to this general rule, yet that the present case does not fall within any of such exceptions; and, lastly, that, if the agreement be such that the corporation is not bound thereby, and cannot be sued thereon, so neither can the other party be bound thereby, nor can the corporation sustain an action, as plaintiffs, upon such an agreement.

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We concur with some of the positions above laid down on the part of the defendants. From the statement of the contract itself on the face of the declaration, and the mode of its execution by an agent on behalf of the corporation, as there described, we think it may be inferred, that the defendants' counsel is entitled to assume, that the common seal of the corporation was never affixed thereto. We agree also in the general rule of law as above stated, and that the case now under consideration does not fall within any of those exceptions, which are so well known as to require no enumeration: but, whatever may be the consequences, where the agreement is entirely *executory* on the part of the corporation, yet, if the contract, instead of being executory, is executed on their part, — if the persons who are parties to the contract with the corporation *have received* the benefit of the consideration moving from the corporation, — in that case, we think, both upon principle and decided authorities, the other parties are bound by the contract, and liable to be sued thereon by the corporation. Even if the contract put in suit by the corporation (*a*) had been, on their part, executory only, not executed — we feel little doubt but that their suing upon the contract would amount to an admission on record by them that such contract was duly entered into on their part, so as to be obligatory on themselves; and that such admission on the record would estop them from setting up as an objection, in a cross action, that it was not sealed with their common seal: on the same principle as it was held by *Holt* C. J., and the court, in *The Mayor of Thetford*'s case (*b*), "that, though a corporation cannot do an act *in pais* without their common seal, yet they may do an act *upon record*; and that is the case of the city of *London* every year, who make an

(*a*) *Vide antè*, 170. n., 172. *Salk.* 103.; 2 *Lord Raym.* 848.; *Lord Holt*, 171.
(*b*) 1 *Salk.* 192.; *S. C.* 3

attorney by warrant of attorney in this court without either sealing or signing; and the reason is, because they are estopped by the record to say that it is not their act. So, if an action be brought against a corporation for a false return, they are estopped to say it is not their return, for, it is *responsio majoris et communitatis* upon record." And, in the present case, the direct allegation by the corporation upon this record, that the agreement was made by *Towse* on their behalf, would, as we think, amount to an estoppel to the corporation from denying the obligatory force of the agreement in a subsequent action against themselves. But it is unnecessary to determine this point on the present occasion, because, on the face of the declaration, there is, as we apprehend, an averment of the performance by the corporation of every matter which amounts to a condition precedent on their part: at least, we so assume in the present stage of the argument, and before considering the pleas of the defendant. The question, therefore, becomes this, whether in the case of a contract executed before action brought, where it appears that the defendants have received the whole benefit of the consideration for which they bargained, it is an answer to an action of assumpsit by the corporation, that the corporation itself was not originally bound by such contract, the same not having been made under their common seal.

Upon the general ground of reason and justice, no such answer can be set up. The defendants having had the benefit of the performance by the corporation of the several stipulations into which they entered, have received the consideration for their own promise; such promise by them is therefore not *nudum pactum*; they never can want to sue the corporation upon the contract, in order to enforce the performance of those stipulations which have already been voluntarily performed; and therefore

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no sound reason can be suggested why they shoul justify their refusal to perform the stipulations made b them, on the ground of inability to sue the corporatio which suit they can never want to sustain. It may po sibly be the case, that, up to the time of the corporatio adopting the contract by performing the stipulations o their part, there was a want of mutuality, from the co poration not being compellable to perform their contrac and that the defendants might, during that interval, hav the power to retract, and insist that their undertakin amounted to a *nudum pactum* only. But, after the ado tion of the contract by the corporation by performanc on their part, upon general principles of reason th right to set up this defence appears altogether to fail.

Independently, however, of the reasonableness of suc construction, there appears authority in law to suppo the position. In the case of *The Barber Surgeons London* v. *Pelson* (*a*) — assumpsit for a forfeiture und a bye-law — where the objection was expressly take that a promise cannot be made to a corporation aggreg without deed, the court held that the action well lay, a that the objection had been overruled in *The Mayor, of London* v. *Goree.* (*b*) Again, in *The Mayor, &c. London* v. *Hunt* (*c*), assumpsit was held to be mainta able by a corporation for tolls. In *The Mayor, &c. Stafford* v. *Till* (*d*) use and occupation was held to maintainable by a corporation aggregate, though th was no demise under seal, the tenant having occupie and paid rent: and the same point was ruled in the cas of *The Dean and Chapter of Rochester* v. *Pierce.* (e The case of *The East India Company* v. *Glover* (*g*) ca ries the law further; for the action in that case was no

(*a*) 2 *Lev.* 252.
(*b*) 1 *Vent.* 298.
(*c*) 3 *Lev.* 37.
(*d*) 4 *Bingh.* 77.; 12 *J. B. Moore,* 260.
(*e*) 1 *Campb.* 466.
(*g*) 1 *Stra.* 612.

upon a promise implied by law on an executed consideration, as, for goods sold, but was assumpsit by a corporation for not accepting and taking away coffee within the time mentioned by an agreement for sale. The objection, indeed, was not raised: but we cannot but suppose it would have been made, if thought maintainable; for, when the defendant wanted to show fraud upon the sale, on the execution of the writ of inquiry before *Pratt* C. J., he refused to let in the evidence, saying, the defendant had admitted the contract to be as the plaintiff had declared, by suffering judgment by default, instead of pleading *non assumpsit*. And, again, the judgment of the court of error in *Bowen* v. *Morris* (*a*), although not directly an authority upon the point, shews a strong indication of the opinion of *Mansfield* C. J., in support of the present action. In that case, the mayor of a corporation had signed a contract to sell landed property belonging to the corporation "on behalf of himself and the rest of the burgesses and commonalty," and the action was brought in the name of the mayor, who had signed the contract, to recover damages. The Lord Chief Justice, in giving judgment that the action was not maintainable in the name of the mayor, observes, "that, although the corporation have not constituted the mayor their bailiff or agent by an instrument under seal, so that he was not competent by that contract to bind the corporation, yet as the mayor signed it, perhaps the corporation might have sustained an action on the contract." And the cases referred to on guarantees (see particularly the judgment in *Kennaway* v. *Treleavan*) (*b*), and on the statute of frauds, where the contract has been signed by the defendant only, and not by the plaintiff, but allowed to be enforced by action, notwithstanding the objection of a want of mutuality, tend strongly to

(*a*) 2 *Taunt.* 374. (*b*) 5 *M.* & *W.* 501.

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support the principle on which we consider the present action maintainable. And the earlier case of *Cooper v. Gooderick* (*a*) may be adverted to, as shewing the opinion of the court upon the legal consequence of bringing a action by a body corporate. In that case the defendan as bailiff of *Emanuel College*, made conusance for re granted to them in fee by indenture. The issue w *non concessit:* and the jury found that the grant granted it by the deed, and delivered that deed to stranger to their use, and they sealed the counterpart that indenture; the question was whether a strange without letter of attorney from them to receive it, mig receive the deed to their use: and it was held by all t court that he might, and that the sealing of the counte part was a sufficient agreement, and as well as if th had made a letter of attorney; "and, if they had n sealed the counterpart, but had brought an action up it, *that* had made the grant perfect:" and judgment w given for the plaintiff.

We therefore think the present action is maintainab by the corporation, unless some sufficient answer appea on the pleas, which we now proceed to consider.

The second plea of the defendant *Robertson* onl raises more distinctly the question which we have al ready fully considered as arising on the face of the declaration itself: and, as we hold the seal of the corporation not to be necessary in order to make the contract obligatory on the defendants, the plea itself is insufficient, and it becomes unnecessary to give any opinion on the subsequent pleadings depending thereon.

The third plea appears to us to be bad for reasons expressed in the course of the argument: and, indeed, the learned counsel for the defendants did not rely upon it.

(*a*) *Cro. Eliz.* 862.

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The fourth plea, which is pleaded to all the breaches in the declaration except that of not returning the survey, plans and valuations, is a traverse, in the terms of the averment in the declaration, "that the plaintiffs did not continually from time to time, and at all times up to and until the time of passing the act of parliament, use all reasonable means and endeavours to promote the progress of the said bill, and to procure an act of parliament to pass thereupon." Now, without stopping to inquire whether such general form of denial is allowable by the rules of pleading, instead of shewing that there were other reasonable means in the power of the plaintiffs which were not resorted to, or that any other means were pointed out to the plaintiffs, and they were requested to use them, but refused, this plea raises the question whether the failure to use all reasonable means &c. is an answer to the action; that is, in other words, whether the using all reasonable means was a condition precedent to the right of the plaintiffs to maintain an action against the defendants for the breach of their part of the agreement. Now, in *Stavers* v. *Curling* (*a*), it was distinctly laid down as the result of a long series of decisions, "that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case, to which intention, when once discovered, all technical forms of expression must give way:" and one of the means of discovering such intention is thus laid down in *Ritchie* v. *Atkinson* (*b*), "Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but, where the covenants go to a part only, there a

(*a*) 3 *New Cases*, 355.; (*b*) 10 *East*, 306. 3 *Scott*, 740.

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remedy lies on the covenant, to recover damages f the breach of it, but it is not a condition precedent."

In this case, the things to be done by the plainti were, withdrawing opposition to the bill, — promoti the progress of the bill by petition or otherwise by reasonable means *at the expense of the defendants*, — a handing over to the defendants certain plans, survey and valuations which had been taken at the expense c the plaintiffs. The things to be done by the defendant on the other hand, were, that they should by the bi secure to the plaintiffs certain portions of the slob an waste land, — that they should pay 1000*l.* on the passin of the act, — that they should pay all the expenses procuring the act, and should return the plans, & forthwith to the plaintiffs if the 1000*l.* were not pai Now, applying the test of common sense to this agre ment, it seems impossible to say that the intention the parties was, that, if the plaintiffs performed every pa of that which they undertook, with the single excepti of omitting to use some means of promoting the b which might be deemed reasonable, however small a inefficient those means might be in their own natu they should not be in a condition to claim the p formance of any part of that which the defendants b agreed to do on their part; and this, too, although omission to use such means may have worked no p judice to the defendants, and they may have actual obtained that object in the pursuit of which those ver means were to be employed. And, again, to apply th other test laid down in *Boone* v. *Eyre* (*a*), and the othe cases before referred to, can it be said that this stipulation goes to the *whole* consideration on either side? It is only a part, and a very small part, of the consideratio moving from the plaintiffs: it certainly does not amoun

(*a*) 1 *H. Blac.* 273. n.

to that for which the defendants were to give the whole consideration moving from them. It is sufficient to refer to the terms of the agreement itself, and to see what stipulations the defendants entered into thereby, to be satisfied that this part of the plaintiffs' engagements goes to a very immaterial part of the consideration on either side.

We hold, therefore, that this stipulation on the part of the plaintiffs, the performance of which has been denied by the fourth plea, is not a condition precedent on the part of the plaintiffs. And, although it may be argued that this must be considered as a condition precedent, because the defendants cannot maintain a cross action thereon for damages; we answer that it is not to be assumed that such cross action is not maintainable, but, on the contrary, for the reasons before given, it might be maintainable. But even if it could not be, the question whether a condition is precedent or not, is a question of *intention* of the parties themselves as it appears on the contract itself, not the determination whether the agreement will bear a cross action in a court of law. We therefore think the fourth plea, which puts in issue the performance of that which is not a condition precedent, cannot be supported.

The fifth plea appears to us to be clearly bad. It alleges that the plaintiffs presented a petition to the House of Lords against the preamble of the bill. This amounts at most to an argumentative traverse either of the averment that the plaintiffs withdrew their opposition to the bill, or of the averment that the plaintiffs used all reasonable means to promote the bill, without distinctly shewing to which it is intended to apply. It is bad, therefore, on the grounds discussed in the consideration of the fourth plea; and indeed it may be further observed, that, neither by the fourth nor the fifth is it shewn that the supposed breach of contract

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imputed to the plaintiffs was committed by them before the breach of contract as to the clauses of the bill alleged in the declaration to have been committed by the defendants.

Inasmuch, therefore, as we think the declaration good, and the several pleas, for the reasons above given, insufficient, we give our judgment for the plaintiffs against the defendant *Robertson*.

The several pleas which are pleaded by the defendant *Booth* are, in substance, the same as those pleaded by the defendant *Robertson*, which we have already considered, and upon which we have given our judgment. The only difference in the subsequent part of the pleadings is, that the plaintiffs, instead of demurring specially to the rejoinder of the defendant *Booth* to the replication to the second plea, have surrejoined, and stated a confirmation of the authority of their agent by a deed-poll under their common seal. But, as the judgment given in the case of *Robertson* proceeded on the ground, as well of the insufficiency of the plea pleaded, as of the sufficiency of the declaration, we think the same reasons apply to the present case, and that it is unnecessary to add any thing to what has been already stated.

The judgment already pronounced upon the pleas of the defendant *Robertson* will also govern those pleaded by the defendant *Staines*, except as to the fifth plea; upon which we have given the plaintiffs leave to amend on the usual terms.

Judgment for the plaintiffs.

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GRANT, qui tam, &c. *v.* RIDLEY.

Jan. 23.

In a qui tam action for penalties, the court refused to stay the proceedings or to give the defendant further time to plead, upon a suggestion by affidavit, that an act of parliament was likely to be passed, the effect of which would be to relieve the defendant from the penalties.

THIS was an action brought to recover two penalties of 100*l.* each, under the statute 1 & 2 *W.* 4. c. lxxvi (*a*), against the defendant as a coal-fitter, for having given false certificates of the names of the collieries out of which certain coals, delivered by him for the port of *London*, had been wrought.

Bompas Serjt. on the part of the defendant applied to stay the proceedings, or for time to plead till the first day of next term. It appeared from the affidavits upon which he moved that the plaintiff had commenced thirty-nine other actions against various persons to recover similar penalties, amounting altogether to 21,500*l.*:

(*a*) Intituled, "An act for regulating the vend and delivery of coals in the cities of *London* and *Westminster*, and in certain parts of the counties of *Middlesex*," &c.

By s. 75. it is enacted "that every fitter, or other person, vending or delivering coals for the port of *London* shall send, in a letter directed to the clerk of the coal market, and put into the general post-office on the day on which the ship or vessel containing any coals shall sail on any such voyage, or shall give to the ship-master of such ship or vessel before the same shall sail on every or any such voyage, a certificate, signed by such fitter, containing the day of the month and year of such loading, the master's and ship's names, and the quantity of tons, *and the usual names of the several and respective collieries out of which the said coals are and shall be wrought and gotten*, and the price paid by the master or masters for each and every sort of coals that each and every fitter or other person vending or delivering coals as aforesaid, his or their agent or servant, hath sold and loaded on board each and every ship or vessel; and, in case any person or persons shall omit or refuse to give such certificate as aforesaid, or shall give or make any false certificate, every person so offending shall, for every such offence, forfeit and pay the sum of 100*l.*" &c.

By a subsequent section the act is declared to be a public act.

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that it was the intention of the defendants in this and th other actions to apply to parliament early in the ensuin session for leave to bring in a bill to stay the proceec ings in these actions, and that it was believed that lea would be given to bring in such bill: that the plaintiff attorney had intimated it was not his intention to oppo the bill, and that it was anticipated that no other pers would offer any opposition, but that the bill would pa into a law before the next assizes (*a*): that a summo for time to plead till the first day of next term had bee taken out, and attended before *Cresswell* J. at chamber and that his lordship had made an order that the d fendant should have four days' time to plead, pleadin issuably, without prejudice to any application to th court. [TINDAL C. J. The present application is in th nature of one *quia timet*. The defendant had bette plead.] In *Whitter* v. *Cazalet* (*b*), which was an actio of trover for goods, where the defence was that the were sold by the plaintiff, the court gave the defenda time to plead, in order that he might have time to file bill of discovery in equity. (*c*) [TINDAL C. J. But h can we speculate upon what the legislature may do The legislature has often interfered to relieve part from vexatious proceedings for penalties, as by 54 *G.* *c.* 54. *s.* 4. to stay actions for penalties against clergym for non-residence; and by 5 & 6 *W.* 4. *c.* 2. *s.* 1. to s actions for penalties incurred by printers of newspap in not complying with the requisitions of 38 *G.* *c.* 78. (*d*) If the legislature should not interfere in t case, the plaintiff would recover. The learned serje also referred to *Roadknight* v. *Green* (*e*).

(*a*) It has since become an act (6 & 7 *Vict.* c. 2.). It received the royal assent on the 3d of *March* 1843.

(*b*) 2 *T. R.* 683.

(*c*) See *Sibson* v. *Nivin*, *Barnes*, 224.; *Clark* v. *Alle* 4 *Dowl. P. C.* 684.

(*d*) And see 7 & 8 *V* c. 58.

(*e*) 1 *Dowl. N. S.* 65. 91 9 *M. & W.* 652.

1843.

GRANT v. RIDLEY.

TINDAL C. J. Perhaps the plaintiff's attorney may *consent* to the time to plead being given to the defendant: but the question for the court is whether, in a state of complete uncertainty as to what course the legislature may think fit to adopt, we have any right to interfere with the plaintiff's proceedings. What we are asked to do is to delay the suit for a certain time; but we have no more right to *delay* than we have to *deny* justice. *Nulli vendemus, nulli* negabimus *aut* differemus *rectum vel justitiam*, are the words of Magna Charta.(*a*) The application to the court is founded upon an intended application to parliament for a bill to relieve the defendant and others from penalties in respect of which actions have been commenced against them; but we have no right to delay the plaintiff's suit upon such a speculation.

ERSKINE J. The only case which is at all like the present is where the defendant obtains a summons before a judge at chambers for time to pay the debt and costs. Sometimes that is a reasonable indulgence. Formerly it was considered that the proper mode of granting that indulgence was, by giving further time to plead. But the matter was brought under the consideration of all the judges, and they thought that time to plead should be granted only in cases where there was a difficulty with regard to the plea. No such difficulty is suggested here.

The other judges concurred.

Rule refused.

(*a*) Cap. 29.

1843.

Jan. 28.

REARDEN *v.* MINTER.

In an action by *A.* against *B.* for commission due to *A.* as agent for *B.*, in procuring him an apprentice, *B.* produced the deed of apprenticeship under notice; and there being an attesting witness to it who was not called, *A.* was nonsuited:

Held, that as *B.* did not claim under the deed any interest in the subject-matter of the cause, the case did not fall within the exception to the rule requiring proof of the execution of an instrument.

Held also, that *A.* was not entitled to a new trial on the ground of surprise, though he was not aware at the trial that there was an attesting witness; it not appearing that any inquiry on the subject.

ASSUMPSIT for work and labour, & plaintiff as the agent for the defendant, in an apprentice for him. Plea: non assumpsit

At the trial before the secondary of *London* 13th of *January*, it appeared that the plaintiff up an establishment, called *The Metropolitan ticeship and Partnership Institution*; that the had applied to him to procure him an apprentice it was alleged on the part of the plaintiff that done by introducing the defendant to the father who was afterwards apprenticed to him. was brought to recover a commission at a centage on the premium paid. The plaintiff the defendant notice to produce the indenture prenticeship, which was produced according the execution was attested by a person who attendance, the plaintiff was nonsuited.

Shee Serjt., on a former day in this term, a rule to set aside the nonsuit, and for a upon the ground that the production of the was not necessary to establish the plain [*Maule* J. If the commission was to be paid in of procuring an apprentice for the defendant tiff would probably not be entitled to any th apprentice was duly bound; and in that case ture of apprenticeship would form a necess

dient of the plaintiff's case.] He also moved upon an affidavit of surprise made by the plaintiff's attorney, stating that until the production of the indenture he was not aware that there was any attesting witness thereto. A rule *nisi* having been granted,

Channell Serjt., now shewed cause.

Shee Serjt., in support of the rule. The deed of apprenticeship being in the possession of the defendant, the plaintiff could not know previously to its production, that there was an attesting witness to it. [*Tindal* C. J. He might have had a judge's order to inspect the deed beforehand.] The plaintiff had no interest in the deed so as to be entitled to compel its production. [*Tindal* C. J. He might, at any rate, have asked the defendant's attorney if there was an attesting witness, and what his name was. *Maule* J. Or he might have inquired of the father of the apprentice. An attesting witness to a deed is not a new invention.] The father might have refused to give the information, or might have forgotten the fact. [*Maule* J. The plaintiff might at least have tried the experiment.] The defendant claimed an interest under the deed, and, having produced it under a notice, he was not entitled to insist upon proof of its execution. [*Tindal* C. J. Where land is claimed by one party under a deed, — the land being the subject matter of the action, — and such party produces the deed under notice, he cannot compel the opposite party to produce the attesting witness, or prove the execution. (a) But that rule has no application here. The defendant does not claim any interest under the deed of apprenticeship.] It is his muniment of title to the lad's services. [*Cresswell* J. But there is no dispute here as to

(a) See 2 *Phill. Evid.* 207. *Collins* v. *Bayntun*, 1 *Q. B.* 118.

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the title to the lad's services. *Erskine* J. The rule only applies where the party producing the deed claims an interest under it, *in the cause.*] The defendant here denies that he was entitled to the services of the apprentice through the plaintiff's assistance. In *Gordon* v. *Secretan* (*a*), though it was decided that, where an instrument is produced at the trial by one of the parties, in consequence of notice from the other, which when produced appears to have been executed by the party producing it and third persons, and to be attested by a subscribing witness, the production of it, in that manner, does not dispense with the necessity of proving the instrument by means of the subscribing witness, though unknown before to the party calling for it, yet the court set aside the nonsuit, on the ground of surprise, in order to give the defendant an opportunity of calling the subscribing witness.

TINDAL C. J. The general rule requires that where there is an attesting witness to an instrument he shall be called. This case does not fall within the exception to that rule, where the party producing the deed claims an interest under it, as in *Pearce* v. *Hooper.* (*b*) In this case the instrument produced in evidence was *res inter alios acta.* I do not see any reason for setting aside the nonsuit, or for granting a new trial on the ground of surprise. (*c*)

Per curiam;

Rule discharged.

(*a*) 8 *East*, 548.
(*b*) 3 *Taunt.* 60.
(*c*) See *Tharpe* v. *Stallwood*, *post. E. T.*

1843.

FITZGERALD *v.* EVANS.

Jan. 28.

The court allowed a distringas to compel appearance to issue, although the writ of summons was indorsed for "50*l.* for debt *and interest thereon*," without stating any time from which the interest was to be computed.

TALFOURD Serjt. applied for a distringas to compel an appearance. The affidavit of the attempts to serve the writ of summons was in the usual form; but the copy of the writ left at the defendant's residence, was indorsed thus: — "The plaintiff claims 50*l.* for debt, *and interest thereon*, and 2*l.* 2*s.* for costs;" without stating from what day the interest was to be calculated. The case had been before *Maule* J. at chambers, who thought this was an irregularity (*a*), and referred the parties to the court. Admitting that it was an irregularity, which, if the writ had been served, would have entitled the defendant to set aside the service (*b*), or if he had offered to pay the amount of debt and costs might have entitled him to a stay of proceedings (*c*), still, being merely an imperfect compliance with the rule as to the indorsement of the writ, it would not prevent the issuing of a distringas. [*Tindal* C. J. It seems like forestalling an objection which the defendant may never take. *Maule* J. It is impossible from the indorsement to say whether the plaintiff seeks to recover 51*l.* or 100*l.* It appeared to me, when the case was before me at chambers, that in order to obtain a distringas it should be shewn that the writ of summons was such, that if served upon the defendant he would have been compelled to appear to the action.] It is submitted, that he must have appeared to this writ if it had been

(*a*) See *Coppel* v. *Brown*, 1 *C. M. & R.* 575.; 3 *Dowl. P. C.* 166.

(*b*) See *Truslove* v. *Whitechurch*, *antè*, Vol. I. p. 426.; 1 *Scott, N. R.* 415.

(*c*) See *Elliston* v. *Robinson*, 2 *C. & M.* 343.; 2 *Dowl. P. C.* 241. See also *Cook* v. *Cooper*, 7 *A. & E.* 605.; 2 *N. & P.* 607.

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FITZGERALD v. EVANS.

served, as it is not a nullity. [*Maule* J. And yet it is admitted, that if he *had* been served he might have moved to have set aside the service. *Tindal* C. J. Perhaps the more regular course will be to allow the distringas to go; and the defendant may move to set aside if he thinks fit.]

Per curiam;

Rule granted.

Jan. 28.

ORLANDO JONES and Another *v.* BERGER.

The notice of objections to a patent delivered by the defendant under stat. 5 & 6 *W.* 4. *c.* 83. *s.* 5. ought to contain more particular information than that which is necessarily conveyed by the defendant's pleas. (*a*)

In an action for the infringement of a patent "for improvements in treating, or operating upon, farinaceous matter and other products, and in manufacturing starch," one objection stated, that the alleged invention had been published in the specification of two previous patents (particularising them), "and also by other persons in other books and writings:" Held, that the books, &c. should be specified.

A second objection stated, that the plaintiff's specification did not "sufficiently distinguish between what was old and what was new:" Held sufficient, as the objection was to an omission in the specification.

The same objection alleged that the plaintiff did not state in his specification "the most beneficial method with which he was then acquainted, of practising his said invention:" Held, sufficiently precise.

A third objection stated that the invention was in use by many persons before the patent, and particularly that the use of rice starch was "known and practised by persons engaged in the manufacture, and finishing, of lace and similar fabrics at *Nottingham and elsewhere:*" Held, that upon striking out the words "and elsewhere," the objection was sufficiently precise.

Semble, per *Maule J.*, that it was sufficiently so without striking out the words.

CASE (in the usual form) for the infringement of a patent, granted to the plaintiff *Jones*, on the 30th of *April* 1840, for certain "improvements in treating

(*a*) See *Neilson* v. *Harford*, 8 *M.* & *W.* 806. 822. acc.

or operating upon, farinaceous matters to obtain starch, and other products, and in manufacturing starch."

Pleas: first, not guilty; secondly, that the plaintiff *Jones* was not the first inventor; thirdly, that he did not, by the instrument in the declaration mentioned, particularly describe and ascertain the nature of his said invention and improvement, &c.; and fourthly, that the working of the said invention was before, and at the time of the making of the letters patent, in use by others within the realm.

The following notice of objections was delivered by the defendant with his pleas, under the 5 & 6 *W.* 4. *c.* 83. *s.* 5.

"That the said *Orlando Jones* was not the true and first inventor of the said invention, the same having been published in the specification of certain letters patent granted to *Thomas Wickham*, and which specification was inrolled on or about the 10th day of *March*, A.D. 1824; and also in the specification of certain other letters patent granted to *William Prince*, and which specification was inrolled on or about the 2d day of *May* 1768 [and also by other persons in other books and writings] (*a*), before the date of the said letters patent of *O. J.* in the declaration mentioned.

"That the said specification does not sufficiently distinguish between what is old and what is new; that the processes therein described are not beneficially applicable to obtaining starch from all farinaceous matter; that the said *O. J.* did not state in the said specification the most beneficial method with which he was then acquainted of practising his said invention; that the proportions and directions given are not such as to enable an ordinary workman to make starch of a quality suitable for the general purposes of commerce; [and that the specification is in other respects uncertain, insufficient and calculated to mislead (*a*)].

(*a*) *Vide post*, p. 218. n. (*a*).

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"That the said invention was in use by many perso before and at the time of the date of the said lett patent, particularly that the use of rice as and for star and the use of rice-flour as and for starch, and the p paring of rice-flour to be used as starch, and the p paration of starch from whole rice, and from rice-flo were known and practised by persons engaged in t manufacture and finishing of lace and similar fabri and in clear-starching, and otherwise dealing with, l and similar fabrics, at *Nottingham* [and elsewhere (a before and at the time of the grant of the said lett patent to *O. J.*, as in the said declaration mentioned."

Sir *Thomas Wilde* Serjt., on a former day in this ter obtained a rule nisi for the defendant to give further a better particulars of objections, upon the ground t those delivered were too vague. He cited *Fisher Dewick.* (*b*)

Channell Serjt. (with whom was *Webster*) now shew cause. The first objection is addressed to the seco plea, which says that *Jones* was not the first inventor the subject of the patent. The objection specifies particular patents for inventions, alleged to be simila that claimed by the plaintiff; and it adds, that the vention had been published "by other persons in ot books and writings." This case is different from th where it has been required that the names should furnished of parties who have used a patent, or wh it was required that an objection should point out wl portion of the alleged invention had previously been use; as in *Heath* v. *Unwin.* (*c*) It is sufficient to st that the principle has been discussed in learned treati

(*a*) *Vide post*, p. 218. n. (*a*).
(*b*) 4 *New Ca.* 706.; 6 *Scott*, 587.
(*c*) 10 *M. & W.* 684.

by other persons. It cannot be required that the defendant should refer to all the cyclopædias in which the subject has been treated of. [*Tindal* C. J. The defendant might keep back his best evidence, and then start upon the plaintiff at the trial with some article in a foreign cyclopædia. The question is, what is the meaning of the objection as it stands.] It is submitted it is sufficient to shew that the principle was well known in the scientific world.

The second objection is sufficiently specific: the general words at the end may be struck out if they are considered objectionable.

In the third it is presumed the plaintiffs require the names and residences to be given of the "persons engaged in the manufacture and finishing of lace and similar fabrics at *Nottingham.*" But in cases where such information has been required no particular trade was specified, as here. In *Bulnois* v. *Mackenzie* (*a*) the defendant stated in one of his objections that the patented article had been used by one *Mann*, in *England*, and *by divers other persons* in other parts of the kingdom, before the date of the plaintiff's patent. The plaintiff thereupon obtained a judge's order, requiring the defendant (*inter alia*) to furnish the plaintiff with "the names, description and places of abode of the several persons respectively alleged in the notice to have used the invention before the patent, and also the dates when the said invention was used:" but this court, upon motion, rescinded that part of the judge's order that required the names and addresses of other parties to be given. In a note in *Webster's Patent Cases* (*b*) the learned reporter refers to the case of *Galloway* v. *Bleaden* (*c*), where *Coltman* J. ordered names, addresses,

(*a*) 4 *New Ca.* 127.; 6 *Dowl. P. C.* 215.; *S. C.* (more fully) 5 *Scott.* 419.

(*b*) Page 268. n. (*a*).

(*c*) *Chitt. Archb.* 1031. *S. C.*, not *S. P.*, *antè*, Vol. I. 247.; 1 *Scott, N. R.* 170.

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and descriptions to be given, and the words "divers oth persons" to be struck out; "but," the reporter adds, " a subsequent case (*Carpenter* v. *Walker*), the objecti stated the making of locks similar to the subject of t patent by the defendant and others, several years bef the date of the letters patent, and their sale *to div persons, and, among others, to* one *S. T.*, of &c.: on su mons to strike out the words 'to divers person, a among others,' or to state the names and descriptions the others besides *S. T.*, to whom sales were made, t parties were referred to the court, who refused the a plication." [*Maule* J. Suppose a patent for maki pins; and an objection were delivered that several p sons had used similar pins; it would hardly be necessa to mention all their names.] It is possible that t stat. 5 & 6 *W.* 4. *c.* 83. may have been passed w reference to the old rules of pleading, under which plea of not guilty gave no information as to the defe intended to be set up.

Bompas Serjt., in support of the rule. Words inserted in these objections of such a vague and gene character, that they render the notice of objections of effect. If the reference, in the first objection, to the pu lication " by other persons in other books and writing were sufficient, it would equally be sufficient to say th the invention had been used by *John Smith* and other pe sons — and *John Smith* might be nobody. [*Tindal* C. This is not quite like saying that an invention h been used by other persons, — it is saying in effect th it had been published in books that were known to t the world.] The books should at least be specifie They may have been published many years ago; and might be impossible upon their production at the tr to ascertain how far they were applicable to the subj matter. The legislature intended that the objectio

should be specific; and the defendant is not tied down to those which he may deliver in the first instance, for he may amend his notice at any time before the trial, upon the discovery of fresh evidence. In *Fisher* v. *Dewick*, after the amended particulars of objection had been delivered pursuant to the judge's order, a summons was taken out for further amended particulars, which summons was heard before *Tindal* C. J. at chambers, by whom, after time taken to consider, the particulars were finally settled as follows: — To the first objection, that the plaintiff was not the first inventor, the defendant had added a statement that "the plaintiff was not in possession of the said alleged improvements before or at the date of the said letters patent;" and these words were expunged by his lordship. Another objection stated that "a particular improvement" had been used by *A. B.* &c. (stating several names and addresses) *and divers other people* within the kingdom and elsewhere; his lordship struck out the words "and divers other people;" and the same course was adopted as to another objection. Another objection was, that "there were several washings (describing them) *and others*, to which the said improvements are inapplicable; and his lordship struck out the words "and others." A further objection stated that the invention for which the patent was granted was more extensive than, and did not correspond with, the invention described in the specification; and his lordship observed that the attention of the plaintiff ought to be specifically called to the particular part or parts in question. That remark of his lordship's applies to the second objection in this case, which states that the specification does not sufficiently distinguish between what is old and what is new. The particular parts should have been pointed out. [*Maule* J. How could that be done? It is an objection to an omission in the specification.] The objection also alleges, "that

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the plaintiff, *Jones*, did not state in his specification the most beneficial method with which he was then acquainted of practising his said invention." The plaintiff cannot tell what this means without specific information [*Tindal* C. J. The plaintiffs must know whether or not they were acquainted with a better method. It is a fact which surely lies more within their own knowledge.] The means which the defendant may attribute to the plaintiffs are not within their knowledge. The third objection amounts to no more than the fourth plea — that the invention had been used by others before the date of the patent. The statute would be utterly useless if the objections were not to be fuller than the pleas. The objection here subsequently mentions "persons engaged in the lace trade at *Nottingham*, and elsewhere;" so that under this notice any one person may be produced as a witness to support it. [*Maule* J. The object of the statute is, that whatever the objection may be, the defendant is to give notice of it; but giving notice of an objection will not make it a legal objection. *Tindal* C. J. The objection refers to a particular trade. The plaintiffs may make inquiries among the class of persons engaged in that trade. *Erskine* J. Proving that the invention had been used by one or two persons would not support the objection, which states that "the said invention was in use by *many* persons."]

TINDAL C. J. The new rules as to pleading, which were promulgated by all the courts in *Hilary* term 1834, under the provisions of the stat. 3 & 4 *W.* 4. *c.* 42. *s.* 1, were certainly made a considerable time — more than twelve months — before the stat. 5 & 6 *W.* 4. *c.* 83. received the royal assent. (*a*) We are not at liberty, therefore

(*a*) The new pleading rules were laid before parliament (in pursuance of the first section of the law amendment act) on the 5th of *February* 1834. They came into operation on

say that the legislature was not aware of the
:e of the new rules, under which the effect of the
"not guilty" in actions on the case was so
lly abridged. (*a*) And when we find that the
ire have directed that the defendant shall give
ntiff a notice of the objections upon which he in-
) rely, it is but reasonable to think they must
eant to require something more particular than
is. What degree of particularity is required it
difficult to define. But the question is, whether
ite has been virtually complied with in this case.
first objection is, that the plaintiffs' invention had
eviously published in the specifications of patents
to two persons who are named, "and also by
ersons in other books and writings." Now I
would be a more fair compliance with the sta-
at the objection should disclose the names of the
, or should specify the books upon which the
s mean to rely. The objections would then come
ithin the analogy of other cases that have been
. And no hardship is hereby imposed upon
ndant, as he can add the names of other publi-
to his notice by applying to a judge at chambers
e before the trial. (*b*) The effect of requiring
ndant to be more specific upon this point will
iminish expense, and it will cause his notice of
n to be in more complete compliance with the
ns of the statute.
general words at the end of the second objection

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lay of *Easter* term fol-
15th of *April*). The
ent act received the
nt on the 10th of *Sep-*
836, but the bill had
ught forward in 1833.

(*a*) See *R. G.* (*Pleading in particular Actions*), iv. 1.

(*b*) See the proviso at the end of sect. 5. of 5 & 6 *W.* 4. c. 83.

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have been given up on the part of the defendant; an the argument on the part of the plantiffs, as to the re of that objection, has been already answered by t court.

With regard to the third objection, I think if t words "and elsewhere" are struck out—leaving it the defendant, if he should, before the trial, disco any places besides *Nottingham*, where the invention h been used, to apply to add the names of such places that there will be no objection to its present form. Th case is distinguishable from *Fisher* v. *Dewick*. That wa a patent for an improvement in machinery, consistin principally in the use of particular wheels or crank They may have been known in particular houses, wit which the plaintiff was not acquainted; and, unless th names of the persons using them were given, nothin was disclosed by the notice. The patent in this case i for making starch generally; and the notice of objectio does limit the alleged user to a particular class of per sons—namely, those engaged in the trade of lace-makin —in a particular place—*Nottingham;* and it is quite a open to the plaintiffs as it is to the defendant, to mak inquiries in that place among that class of persons. Bu as the words "and elsewhere" are too general, an might mislead the plaintiffs, I think they should be struc out.

ERSKINE J. I am of the same opinion. It must b taken that something more was intended by the legisla ture to be disclosed in the notice of objection than woul be contained in the pleas themselves. The court has t see that the objections are stated with a reasonable par ticularity. And I think that, with the alterations sug gested by my lord, sufficient information will be give by these objections.

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MAULE J. I also think that the statute requires some further information to be given by the notice of objections than would be conveyed by the pleas; as the new rules of pleading must be assumed to have been known to the legislature at the time the statute passed. In *Fisher* v. *Dewick* the patent was for certain improvements in machinery; one notice of objection on the part of the defendant was, that the machinery had been in previous use by certain persons who were named, "and divers other people in this kingdom and elsewhere." There was nothing in this notice to distinguish or point out these "other people." The objection was as wide as the plea, and the court held that it should be narrowed by naming the parties who, according to the defendant, had previously used the invention. The invention claimed here is for improvements in the manufacture of starch. The third objection is not in general terms—that the same process had been used by certain other persons; but the objection is narrowed and excludes all but rice-starch, and that applied to a particular purpose, namely, the dressing of lace. I think that is a reasonable particularity, and sufficiently points out the nature of the inquiry which the plaintiffs may institute—the nature of the fabric and the particular starch being specified. My own opinion is that the words "and elsewhere"—might have been permitted to stand; but upon this point I do not think it worth while to differ from the rest of the court; and I dare say the omission of the words will not make much difference to the parties. With respect to naming the books alluded to in the first objection, I think it may be as well that the defendant should state them—by the names of the authors or some other description—in the same way as he has stated the specifications of the patents, in which he says the plaintiff's invention has been previously published.

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CRESSWELL J. It is very difficult to lay down any general rule as to the particularity required in notices of objection of this nature. If the act of parliament under which they are delivered had been passed before the new pleading rules were promulgated, I should have thought that the fifth section was intended to be to the same purport as the rule that has been referred to: but the general rules were laid on the tables of both houses of parliament and came into operation, before the act passed. I think, therefore, the act must mean that a defendant should have some information further than the pleas would supply; and that we are authorised to call upon the defendant to give some more particular information. I entirely concur with the rest of the court as to the amendments suggested.

Rule absolute accordingly. (a)

(a) The notice of objections was accordingly amended *by striking out the words* inserted in brackets (*ut suprà*, p. 209, 210.), and after the words "at *Nottingham*," (*suprà*, p. 210.) the defendant afterwards (under an order of *Erskine* J., dated 26th of *May*, 1843) added the following sentence; "and at *Linton* near *Nottingham*, at *Radford* near *Nottingham*, and at *Tiverton* in *Devonshire*, and further that the manufacture of starch from rice, both whole and ground, was used, known and practised at *Cornbrook* near *Manchester*." See *R.* v. *Walton*, 2 *Q. B.* 969., where, on a *scire facias* to repeal a patent, the prosecutor had, while the record was in Chancery, filed a notice of objections under the same section of the statute (5 & *W.* 4. *c.* 83. *s.* 5.), that *other persons* than the patentee had used the invention in *England* before the patent, and the defendant had applied to the Master of the Rolls for an order on the prosecutor to deliver particular of the names of such persons, which was refused. When the case came before the court of Queen's Bench a similar application was made, and it was stated by counsel, in support of the rule, that similar rules had been granted by this court; but after time taken to consider, the court of Queen's Bench refused the application, Lord *Denman* C. J. stating that they agreed with the Master of the Rolls rather than with this court.

ıL *v.* The London and Blackwall Railway Company.

Jan. 3.

The first count of the declaration stated that *London* and *Blackwall* Railway (which said ı authorised by and constructed according to

By a railway act, it is enacted, that if any person interested in

l by the execution of the act shall not agree with the company as ıt of purchase money or compensation, &c., and shall request that dispute may be submitted to the determination of a jury, the company *warrant* to the *sheriff or sheriffs* of the county or city where the stion shall be situate, &c.; and if such sheriff or sheriffs shall be a ır shareholders in the company, *then to any of the coroners* of the &c., commanding such sheriff, &c. to impannel a jury, who are to ssess, &c.:

ıether this enactment would apply in a case where, as in *Middlesex*, sheriff is constituted of two persons, and where one only of such ıhareholder in the company.

equent act extending the line of railway, it is enacted, that in cases tween the company and parties claiming compensation, wherein the not upon request, &c., within twenty-one days, issue their warrant or sheriffs of the county or city where, &c., it shall be lawful for ıaving given notice himself to send a *request* in writing to the sheriff, g to the tenor of the former act; and the sheriff, &c. shall there- el a jury, &c.:

the former enactment did not apply in a case where a party pro- the latter act, so as to render void the proceedings held before the ormer enactment being confined to cases where the company them- their warrant, which they were not to direct to one of their own and the latter embracing cases in which the company having neg- e the warrant, the party in dispute with them might call upon the ld an inquisition; as such party would have no means of knowing ot the sheriff was a shareholder.

ıether such proceedings would have been avoidable, if objected to at ne.

that, where the company appeared by their counsel before the sheriff the holding of the inquisition, without objection, they had waived ection.

rst act it is further enacted, that the jury shall inquire, &c., and t for the sum to be paid for the purchase of lands, and also the sum way of satisfaction, &c. for goodwill, &c., and that such satisfaction red into, and assessed, separately and distinctly from the value of the

ond act it is further enacted, that in case any dwelling-house, &c. feet from the railway shall be deteriorated in value, and the owner,

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CORRIGAL v. The LONDON and BLACKWALL Railway Company.

and under and by virtue of the provisions of a certain act of parliament made and passed in a session, &c. (*a*) intituled "An act, &c.;" and also of a certain other act of parliament made and passed &c. (*b*) intituled, &c., was first opened to the public on the 6th of *July* 1840; that the plaintiff, theretofore, to wit, on the 24th of *October*, in the year last aforesaid, was the lessee, for a certain term of years then and still unexpired, to wit, for a term of

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&c. shall require the company to purchase the same, the company shall treat for the purchase and for the compensation, &c. for any loss, &c. in respect of any tenant's fixtures, &c.; and in case the parties cannot agree as to the value of such dwelling-house, &c., or as to the amount of such compensation, &c., then the amount shall be ascertained by the verdict of a jury in the manner described in the former act, &c., provided that no party shall be entitled to receive compensation unless the jury shall by their verdict determine that the property has been deteriorated in value by the construction of the railway:

The plaintiff, in an action upon a judgment founded upon an inquisition to recover, under the last-mentioned section, the purchase-money of a house, and compensation for tenant's fixtures, &c., stated that the jury gave a *verdict* for 250*l.* "for the purchase of the house, and also by way of satisfaction, &c. for all damage in respect of the tenant's fixtures." The defendant pleaded that the plaintiff adduced *evidence* at the inquisition, "not only of the loss and damage in respect of good-will, tenant's fixtures, &c., but also of certain loss and damage in respect of the dwelling-house, by reason of the construction of the railway; that the jurors did assess and give a verdict for the sum of 250*l.* for the purchase of the dwelling-house, and also by way of satisfaction, &c. for the several losses, &c. in the plea mentioned;" whereby the inquisition, verdict, and judgment were void:

Held, that the mere fact of the plaintiff's adducing such evidence, and the receiving thereof by the sheriff, did not affect the validity of the verdict; as such evidence may have been given to shew that the house had been deteriorated; which was necessary to give jurisdiction to the sheriff and jury:

Held also, that the verdict, as stated in the declaration, excluded the possibility of any damages being given for the deterioration of the house by the construction of the railway:

Held also, that the enactment in the first act as to separate assessments, was directory only, and not in the nature of a condition.

By the first act it was provided, that if the jury gave the same or a greater sum than the company had previously offered, the company should pay all the costs of the inquisition; if less than had been previously offered, that each party should pay half the costs; and that if by reason of absence abroad, or any other disability, any person should have been prevented from treating with the company, they the company should pay the whole costs:

The second act was silent as to costs:

Held, that a party proceeding under the second act, in a case not falling within the classes mentioned in the first, was not entitled to costs.

(*a*) 6 & 7 *W.* 4. *c.* cxxiii. (*b*) 2 & 3 *Vict. c.* xcv.

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seventy-four years and one quarter of another year from the 29th of *September* 1817, of a certain dwelling-house numbered 82, and situate and being in a certain street called *Lucas Street*, in the *Commercial Road*, in the Parish of *St. George*, in the county of *Middlesex*, and within fifty feet from the said railway; and by reason of the construction of the said railway the said dwelling-house, and the estate, interest and property of the plaintiff therein as such lessee as aforesaid, were then, to wit, on the 24th of *October* 1840 aforesaid, greatly deteriorated in value; and thereupon the plaintiff, so being such lessee as aforesaid, and the said dwelling-house being so situate and so deteriorated in value as aforesaid, did, within the period of twelve months from the opening of the said railway as aforesaid, to wit, on the said 24th of *October* 1840, by notice in writing, bearing date the day and year last aforesaid, and left at the office of the said company, to wit, on the 2d of *November* in the year last aforesaid, require the said company to purchase his, the plaintiff's, estate, interest and property in the dwelling-house whereof he was such lessee, and wherein he was so interested as aforesaid, and thereby then gave the said company notice that he was ready to treat for the sale of the same to the said company, according to the provisions of the said acts of parliament made and passed concerning the said railway; and to the said notice the plaintiff annexed a plan more particularly delineating the said dwelling-house: that the said company did not nor would, within thirty days after the service of the said notice as aforesaid, treat for the purchase of the estate, interest, and property of him the plaintiff as such lessee as aforesaid, in the said dwelling-house mentioned in the said notice, or for the compensation, recompense or satisfaction to be made to him as such lessee as aforesaid for any loss, damage or injury in respect of any good-will, tenant's fixtures, improve-

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ments, or otherwise, occasioned by the taking ther
nor did the plaintiff and the said company, within t
time or afterwards agree as to the value of the est
&c. of him the plaintiff as such lessee as aforesaid in
dwelling-house, or as to the amount or value of
compensation, &c. to be paid to him, the plaintiff, as s
lessee, for such good-will, &c. as aforesaid: whereup
he, the plaintiff, afterwards, and after the expiration
the said thirty days, to wit, on the 29th of *Decem*
1840, did, by a request in writing then made by him,
quest the said company to issue a warrant, and to s
mit the said matter in dispute between him, the plaint
and the said company, of and concerning the premi
aforesaid, to the determination of a jury, in the manner
according to the regulations prescribed by the said act
parliament: that the company did not nor would, wit
the space of twenty-one days after the making the
request, comply with the same, or issue their warr
according to the regulations prescribed by the said
for the impannelling and summoning a jury as aforesa
and thereupon he the plaintiff, afterwards, and after
expiration of the said space of twenty-one days after
making of the said request to the said company as af
said, to wit, on the 10th of *February* 1841, did him
send a request in writing to the sheriff of *Middl*
aforesaid, according to the tenor and provisions of
said acts, and did thereby request the said sheriff
impannel, summon and return a jury according to
provisions and in the manner prescribed by the said
of parliament, to require of and assess and give a
dict for the sum of money to be paid by the
company to the plaintiff for the purchase of his es
&c. as such lessee as aforesaid in the said dwelling-h
as aforesaid, and for the compensation, &c. to be
to the plaintiff by the said company for loss, dan
and injury in respect of the good-will, &c. occasione

the taking thereof as aforesaid, and to proceed in that behalf in the manner and according to the regulations prescribed in the said first-mentioned act of parliament, upon the issuing of the warrant of the said company as therein directed: that, upon a certain inquisition taken in pursuance to, and accordance and compliance with the last-mentioned request, afterwards, to wit, on the 6th of *March* 1841, to wit, at the house known by the name of the Sheriff's Office in *Red Lion Square*, in the county of *Middlesex*, before *Thomas Farncombe* and *Michael Gibbs*, esquires, then being sheriff of the said county of *Middlesex*, *W. F. J.*, *W. J.*, &c. &c., twelve honest, lawful, sufficient and indifferent men of the said county, qualified according to the laws of this realm to serve on juries for trials of issues in Her Majesty's courts of record at *Westminster*, being duly impannelled, summoned, returned and drawn pursuant to the provisions of the said act by the said *T. F.* and *M. G.*, at the time of the said request and then being sheriff of the said county of *Middlesex* as aforesaid, and being by and before such sheriff at the time and place last aforesaid duly sworn to inquire of and concerning the matters in the said last-mentioned request in that behalf mentioned, and thereby referred to, to be inquired of, assessed and ascertained by them in manner therein mentioned; and the plaintiff and the said company, by their counsel respectively, having, at the time and place of inquisition aforesaid, appeared before the said sheriff and the said jurors, and having respectively adduced evidence before the said sheriff and jurors touching the matters so in question as aforesaid, the said jurors, upon their oath said, that the said dwelling-house before and at the time of such notice to purchase so given as aforesaid and then still was deteriorated in value by the construction of the said railway authorised by the first-mentioned act; and they the said jurors did then and there assess and give a

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verdict for the sum of 250*l.*, to be paid by the said co pany to the plaintiff for the purchase by them of t plaintiff of his estate and interest in the said dwellin house, and also by way of compensation, &c. for damage in respect of the tenant's fixtures of the pla tiff in the said dwelling-house, or in other respe whatsoever, under the provisions of the said acts in th behalf; that the said sheriff did then and there, accor ingly, pursuant to the said acts, give judgment for th said sum of 250*l.* so assessed by the said jury, to be pai by the said company to the plaintiff, according to th provisions of the said acts; that the said verdict an judgment were then and there, to wit, at the time an place of holding the said inquisition as aforesaid, dul signed by the said sheriff: that the said verdict an judgment, having been so signed by the said sheriff a aforesaid, were afterwards, and before the commenc ment of this suit, to wit, on the 24th of *May* 1841, b the said sheriff duly deposited, left and lodged with th clerk of the peace for the county of *Middlesex*, to be b him kept, and the same are now by him kept among th records of the quarter sessions of the said county o *Middlesex*; that the said verdict and judgment still re main among the records of the said quarter sessions o the said county of *Middlesex* in full force and effec and in nowise satisfied, reversed or annulled: that th parish of *St. George* above mentioned is the same paris as described in the first-mentioned act of parliament: the parish of *St. George in the East*: of all which sa premises the said company then and there, to wit, o the day and year last aforesaid, had notice: that th plaintiff being interested as aforesaid in the property which the said inquisition referred, and known to th said company as the person so interested therein an entitled to receive the said sum of 250*l.* upon maki such title and conveyance as thereinafter mentione

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and being there present, to wit, in the county of *Middlesex* aforesaid, and the said property not being property which any corporation, trustee or person under disability was, by the first-mentioned act, capacitated to convey (of all which premises the said company then had notice), was afterwards, and after the recording of the said verdict and judgment, and within a reasonable time in that behalf, and before the commencement of this suit, to wit, on the day and year last aforesaid, ready and willing and able to make to the said company a good title to the property to which the said inquisition referred, and also to make a proper conveyance thereof to the said company, upon payment by them of the said sum of 250*l.*, and to receive that sum accordingly; and that the said company then had notice; but that the said company discharged him from making, and waived the tender of any such title or conveyance, and gave him notice that they would not accept such title and conveyance, or either of them, if made: that the plaintiff had not as yet obtained payment and satisfaction from the said company of the said sum of 250*l.*, for which the said jurors so gave their verdict, and the said sheriff so gave judgment, as aforesaid, or any part thereof, although the said company, afterwards, and before the commencement of this suit, were requested by the plaintiff to pay him the said sum of money; whereby and by reason of the said sum of 250*l.* being and remaining wholly due, &c., *actio accrevit.*

The second count stated, that, after the said inquisition in the first count mentioned, to wit, on the day and year last aforesaid, the costs and charges and expenses of summoning the jury, and the expenses of witnesses on the said inquisition, were duly settled and determined by the said sheriff pursuant to the said acts at a certain sum, to wit, the sum of 110*l.* 1*s.* 11*d.*, to be paid by the said company to the plaintiff, who by reason of the pre-

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mises in the said first count mentioned had been p vented from treating and agreeing as aforesaid; and t thereof the said company (who prior to such settlem and determination had had due notice to attend bef the said sheriff on that occasion) afterwards, to wit, the day and year last aforesaid had notice; and the l mentioned sum of money was then, and more than t days before the commencement of this suit, duly d manded of the said company by the plaintiff; yet th the plaintiff had not yet obtained payment or satisfa tion of the last-mentioned sum of money: whereby *actio accrevit.*

Third plea; that the said *Thomas Farncombe*, E in the declaration mentioned, at the time of the s request so made by the plaintiff to the said sheriff *Middlesex* to summon a jury for the purposes in t declaration in that behalf mentioned, and thence c tinually until and at the respective times of the holdi the inquisition, and giving the judgment in the fi count mentioned, and of the settling and determini the costs, charges and expenses in the second co mentioned, was and continued to be a shareholder the said company; and that by means thereof the s inquisition and judgment, and the said settling and termining the costs, charges and expenses, were and wholly void, and of no force or effect: Verification.

Fourth plea; that, upon the holding of the inquisit in the first count of the declaration mentioned, to on the day and at the place in the said first count that behalf mentioned, the plaintiff adduced evide before the said sheriff and jurors, not only of the l and damage in respect of good will, tenants' fixtu improvements, or otherwise, alleged by the plaintiff have been occasioned by the taking of the dwellin house in the declaration mentioned, but also of cert loss and damage alleged by the plaintiff to have b

sustained by him in respect of his said dwelling-house, by reason of the construction of the said railway; that the said jurors did assess and give a verdict for the sum of 250*l.* to be paid by the company to the plaintiff for the purchase by them of the said plaintiff of his said estate and interest in the said dwelling-house, and also by way of satisfaction, recompense and compensation for the several losses and damages in this plea hereinbefore mentioned; by reason of which said premises the said inquisition, and the said verdict and judgment in the declaration mentioned, became and were and are wholly void and of none effect: Verification.

Demurrer, to the third plea, assigning for causes that the said plea neither traversed, nor confessed and avoided, the matters alleged in the declaration; and that, if the said plea sufficiently confessed and admitted the matters alleged in the declaration, yet it did not set forth or allege any matters or things which shewed that the said inquisition and judgment, and the said settling and determining the said costs, charges and expenses, or either of them, were of no force and effect; that the said inquisition and judgment, and the settling and determining the said costs, &c., and each of them, were good, valid and effectual, notwithstanding the said *Thomas Farncombe*, Esq., at the several times in the said plea mentioned, was a shareholder in the said company; that, if by the said plea it was intended to be shewn that the said sheriff to whom the said request was made, and before whom the said inquisition was holden, and by whom the said judgment was given, and by whom the said costs, &c. were settled and determined, was at the several times in the said plea mentioned a shareholder in the said company, it should have been alleged that both the said *T. F.* and the said *Michael Gibbs*, Esq., at the said several times last aforesaid, were respectively shareholders in the said com-

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pany; for, the said *T. F.* and *M. G.* Esqs., at t several times last aforesaid, were together sheriff *Middlesex*, and not either of them alone; that the p did not, therefore, shew that the said sheriff was a sha holder in the said company, and the fact of any ot person than the said sheriff being at the several tin last aforesaid a shareholder in the said company, wo not render the said inquisition and judgment, or t settling and determining the said costs, &c., or either them, void; that the objection to the validity of the s costs, &c., by reason of the said *T. F.* being a sha holder in the said company, could not now be plea in bar to the declaration; that it appeared by the s inquisition and proceedings that the said company peared upon the said inquiry, and took the benefi the same, and that they could not now object that said *T. F.* was at the time a shareholder, a fact wh the said company then knew; that there was nothin the acts of parliament relating to the said comp which makes an inquisition, like the present, bad reason of one or even both of the persons filling office of sheriff of *Middlesex* being a shareholder shareholders in the said company; and that the plea is in other respects uncertain, &c.

To the fourth plea, that it was not alleged in t plea that it appeared by the record of the said ver and judgment that such evidence was adduced, a that plea mentioned, and, unless it so appeared, said company were estopped from alleging the fac be so; and that no proof of such fact, except the re itself, could be now given; that it was not alleged such evidence was received by the court, or allowe go to the jury, or influenced their verdict, or that said sum of 250*l.*, or any part thereof, was in fact sessed by the jurors in respect of the loss or dam alleged to be sustained by reason of the constructio

the railway; that, even supposing the fact to be so, it would not make the verdict or judgment void, or form any objection to the same; that it was not alleged in the said plea that it appeared by the record of the said verdict and judgment that any part of the said sum of 250*l.* was given by way of satisfaction, recompense or compensation for such loss or damage as last aforesaid; but, on the contrary, it appeared by the record of the said verdict and judgment as set forth in the declaration, that the said sum of 250*l.* was given for the purchase of the plaintiff's estate and interest in the said dwelling-house, and also by way of satisfaction, recompense and compensation for all damages in respect of the tenants' fixtures of the plaintiff in the said dwelling-house, or in other respects whatsoever, under the provisions of the said acts of parliament in that behalf; whereas the said company by the last-mentioned plea meant to insist that the said verdict and judgment were partly given in respect of matters not warranted by the provisions of those acts, which the said company were estopped by the said record from doing; that it did not appear by the last-mentioned plea, that the verdict therein first mentioned was the same verdict as the verdict mentioned in the declaration, and which was taken on the said inquisition therein mentioned, and that the said last plea was in other respects uncertain, &c. Joinder.

The points marked for argument on the part of the plaintiff, were substantially the same as the causes assigned for demurrer. The points marked on the part of the defendant were as follows: —

1st. That the inquisition is void in consequence of the personal disability of *Thomas Farncombe*, as alleged in the third plea.

2d. That the defendants are not estopped from alleging that the jury exceeded the authority given them by statute in the manner alleged in the fourth plea.

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3d. That the sheriff had no authority to give judgment for the 250*l.*, as mentioned in the first count of the declaration.

4th. That the first count of the declaration is defective, because it does not appear therefrom that the 250*l.* were assessed by the jury in respect *of the amount* of the value of the said *dwelling-house*, and the *compensation for loss, damage or injury in respect of tenant's fixtures, improvements, or otherwise occasioned by the taking thereof*, but on the contrary thereof it expressly appears thereby that the said sum was assessed in respect of other damages; which fact is admitted to be true by the demurrer to the fourth plea.

5th. That the second count of the declaration is defective, because in cases under the 2 & 3 *Vict. c.* xcv. *s.* 23. (being the enactments under which the plaintiff proceeded) the sheriff has no power to award or settle costs, nor can the party taking the benefit thereof claim any costs.

6th. That an action of debt will not lie either for the 250*l.* or for the costs.

The case was argued in last *Michaelmas* term. (*a*)

(*a*) *Nov.* 11. Before *Tindal* C. J., *Coltman*, *Erskine*, and *Maule* JJ.

The following sections of the acts were referred to in the argument:

6 & 7 *W.* 4. *c.* cxxiii. *s.* 21. enacts, "That all and every body or bodies politic, and other person or persons hereinbefore capacitated to contract for, sell and convey any such tenements or hereditaments as aforesaid, and any other owner or owners of any such tenements, &c., or any share or shares, estate or estates, interest or interests therein, may accept and receive such satisfaction or recompense for the value thereof; and such body or bodies, &c. owners, and also any tenant for a year, or from year to year, or at will, or other occupier of any such premises entitled to any compensation for such good will or improvements as shall be lost, and for tenant's fixtures, and for such injury or damage as shall be sustained on account of the execution of this act, or in anywise relating thereto, may accept and receive such sum of money in respect thereof as

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Channell Serjt. (with whom was *Butt*) for the plaintiff. The first question, intended to be raised by the third plea, is, whether the fact that one of the individuals, who

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shall be agreed upon between them respectively, and the said company; and in case the said company and the said parties interested in such tenements, &c., goodwill, &c., or sustaining such injury or damage, cannot or do not agree as to the amount or value of such satisfaction, recompense or compensation, the same respectively shall be ascertained and settled by a jury in manner hereinafter directed."

Sect. 22. "for settling all differences which may arise between the said company and the several owners and occupiers of, or persons interested in, any lands which shall or may be taken, used, damaged or injuriously affected by the execution of any of the powers thereby granted, enacts, "that, if any person, corporation or trustee so interested or entitled, and capacitated to sell, agree, convey or release as aforesaid, shall not agree with the said company as to the amount of such purchase money or satisfaction, recompense, or other compensation as aforesaid; or if any of the parties entitled to receive such purchase money, &c. shall refuse to accept such purchase money, &c. as shall be offered by the said company, and shall give notice thereof in writing to the said company within twenty-one days next after such offer shall have been made, and the party giving such notice shall therein request that the matter in dispute may be submitted to the determination of a jury; or if any of such parties as aforesaid shall, for the space of twenty-one days next after notice in writing shall have been given to the clerk, agent or principal officer of any such corporation, or to any of such trustees or persons respectively, or left at his last or usual place of abode, or with the tenant or occupier of any lands required for the purposes of this act, refuse to treat or shall not agree with the said company for the sale, conveyance and release of their respective estates or interests, or the respective estates or interests which they respectively are hereby capacitated to convey therein, or shall by reason of absence be prevented from treating, or shall by reason of any impediment or disability, whether provided for by this act or not, be incapable of making such agreement, conveyance or release as shall be necessary or expedient for enabling the said company to take such lands, or to proceed in making the railway and other the works aforesaid, or shall not disclose and prove the state of the title to the premises of which they respectively may be in possession, or of the share, interest or charge which they may claim to be entitled unto or interested in, or in any other case where agreement for compensation for damages incurred

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jointly with another held the office of sheriff of *Middlesex*, at the time the inquisition was held, was a shareholder, rendered the inquisition void.

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in the execution of this act, or for the purchase of lands required for the purposes of this act, cannot be made; then and in every such case the said company shall, and they are hereby required from time to time to issue a warrant, either under their common seal, or under the hands and seals of three at least of the directors of the said company, *to the sheriff or sheriffs of the county or city* where the lands in question shall be situate, or in case the said lands shall be situate within the liberty of His Majesty's Tower of *London*, then to the bailiff of the said liberty; and *if such sheriff or sheriffs*, or their under-sheriff or under-sheriffs, or such bailiff or his under-bailiff respectively, *shall be a shareholder or shareholders in the said company*, or enjoy any place of trust or profit under the said company, or shall be in anywise interested in the matters in question *then to any of the coroners* of the said county, city or liberty not interested as aforesaid; or if all the coroners shall be so interested, then to some person living within the said county, city or liberty, and free from personal disability, who shall have filled the said office of sheriff, bailiff or coroner within the said county, city or liberty (a person having more recently served either office being preferred), commanding such sheriff or sheriffs or other person to impannel, summon and return, and the said sheriff, &c. is and are hereby accordingly empowered and required to impannel, &c. a jury of at least forty-eight sufficient and indifferent men, qualified according to the laws of this realm to serve on juries for trials of issues in His Majesty's courts of record at *Westminster*; and the persons so to be impannelled, &c. are hereby required to appear before the said sheriff, &c. if the property in question be situate in *Middlesex* or within the liberty of His Majesty's Tower of *London*, or in case it be situate within the city of *London*, then, &c. at such time and place as in such warrant shall be appointed, and to attend from day to day until duly discharged; and out of such persons so to be impannelled, &c. a jury of twelve men shall be drawn by the said sheriff, under-sheriff, &c. or by some person to be by them respectively appointed, in such manner as juries for trials of issues joined in His Majesty's courts of record at *Westminster* are by law directed to be drawn." The section then contains provision for returning a jury *de circumstantibus*, in cases of necessity for enabling all parties concerned to challenge any jury man, but *not the array*, for summoning witnesses, and for authorising a view by six of the jury; and it then proceeds as follows: "and such jury shall

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The twenty-second section of the 6 & 7 *W.* 4. *c.* cxxiii. —the first act under which the railway was constructed —provides that where the company and the owners of

upon their oaths, or being quakers, upon their affirmations (which oaths, &c. as well as the oaths, &c. of all such persons as shall be called upon to give evidence, the said sheriff, &c. is empowered to administer), *inquire of, and assess, and give a verdict for the sum of money to be paid for the purchase* of such lands except for such interest therein as shall have been of right purchased by the said company from any other person, *and also the sum of money* to be paid *by way of satisfaction, recompense, or compensation for goodwill, improvements, tenant's fixtures, or for any injury or damage whatsoever* which shall before that time have been done or sustained as aforesaid, and for the future, temporary or perpetual, or for any recurring damages to be so done or sustained as aforesaid, and the cause and occasion of which shall have been in part only obviated, removed or repaired by the said company, and which cannot or will not be further obviated, &c. which satisfaction, &c. for such damage or loss shall be inquired into and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid; and *the said sheriff, &c. shall accordingly give judgment for such purchase money, satisfaction, &c. as shall be assessed by such jury;* which said verdict and the judgment thereon to be pronounced as aforesaid, shall be binding and conclusive to all intents and purposes upon all persons and corporations whatsoever: provided always, that, in such inquiry the person or corporation claiming compensation shall be plaintiff, and shall have all such rights and privileges as plaintiffs in actions at law are entitled to: provided also that not less than twenty-one days' notice in writing of the time and place at which such jury are so required to be returned shall be given by the said company to the party with whom any such controversy shall arise, either by delivering such notice, &c."

Sect. 24. enacts, "That the said verdicts and judgments being first signed by the said sheriff, &c. shall be kept by the clerk of the peace for the county or liberty in which the matter in dispute shall have arisen, among the records of the quarter sessions of such county or liberty, &c. and shall be deemed records to all intents and purposes; and the same, or true copies thereof, shall be allowed to be good evidence in all courts whatsoever, &c."

Sect. 27. enacts, "That, in every case in which the verdict of a jury summoned as aforesaid shall be given for the same or a greater sum than shall have been previously offered by the said company for the *purchase* of any lands to be used or taken by them for the purposes of this act, or *as compen-*

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property which may be injured by the railway, agree as to the amount of purchase or compen the company are to issue their warrant "to the

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sation for any damage or loss which may happen or arise in the execution of any of the powers hereby granted, all the *costs*, charges and expenses of summoning such jury, and the expenses of witnesses shall be defrayed by the said company, and such costs, &c. shall be settled and determined by the said sheriff, &c.; and in case such costs, &c. shall not be paid to the party entitled to receive the same within ten days after the same shall have been demanded, then the same shall and may be levied and recovered by distress and sale of any goods and chattels of the said company, under a warrant to be issued for that purpose by any justice of the peace for the county, city or liberty wherein such inquisition shall be held, not interested in the matter in question; which warrant such justice is hereby authorised and required to issue under his hand and seal, on application made to him for that purpose by any party entitled to receive such costs, &c.; but if the verdict of the jury shall be given for a less sum than shall have been previously offered by the said company, one moiety of the said costs, &c. shall be defrayed by the party with whom the said company shall have such controversy or dispute, and the remainder shall be defrayed by the said company; and the former moiety of such costs, &c. having been ascertained and settled in manner hereinbefore me shall and may be dedu of the money adjudge paid to such other part much money advanced for his use; and the pay tender of the remainde money so adjudged deemed and taken to al and purposes to be go ment or tender in sat of the whole thereof: always that in cases ir by reason of absence in parts, or from any oth or disability not here provided for, any pers have been prevented fro ing and agreeing as a the whole of such co shall be borne and paid said company."

Sect. 28. enacts, "T said company shall obliged, nor shall any ju summoned by virtue of be allowed, (without the of the said company) ceive or take notice of a plaint to be made by a for any loss or injury sustained, or supposed t tained, in consequence execution of any of the p this act, unless notice in by or on behalf of the p corporation making su plaint, stating the nat tent, and particulars loss or injury, and the or the compensation cl respect thereof, shall h given by such person o ration to the said comp days before the summo

or sheriffs of the county or city where the lands," &c. are situate; and in case "such sheriff or sheriffs, &c. shall be a shareholder or shareholders in the company," then the warrant is to go to the coroners.

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such jury, and within the space of six calendar months after the time of such supposed loss or injury having been sustained, or after the doing or committing thereof shall have ceased."

Sect. 51. contains similar provisions as those contained in the 2 & 3 *Vict. c.* xcv. *s.* 23. (*infrà*) relating to the extended line of railway.

2 & 3 *Vict. c.* xcv., by which the line of railway was extended (after reciting the former act, and the 1 *Vict. c.* cxxxiii.), by *s.* 18. enacts "That in all cases where the verdict of a jury, summoned as by the said first recited act (6 & 7 *W.* 4. *c.* cxxiii. *s.* 22.) directed, shall be given for the same or for a greater sum than shall have been previously offered by the said company, for the purchase of any lands to be used or taken by them, for the purposes of the said recited acts, or this act, or as compensation for any damage or loss which may happen or arise, in the execution of any of the powers thereof, the expenses of instructing and the reasonable fees of counsel, not exceeding two in number, for attending the enquiry before such jury, and the reasonable expenses of one surveyor which may have been paid by the party with whom the said company may be in dispute shall be paid by the said company, and the amount of such fees shall be settled and determined by the sheriff, under-sheriff, &c. in like manner as the costs of summoning such jury, and other expenses payable by the said company, but upon the same scale of allowance as may for the time being be adopted or allowed by the taxing officers of Her Majesty's courts of record at *Westminster*."

Sect. 22. enacts, "That in all cases of dispute between the company and the parties claiming compensation from the company under the provisions of the above recited acts and the present act, wherein the company do not, upon request made by such party or parties to submit the matter in dispute to the determination of a jury, within the space of twenty-one days, issue their warrant, according to the regulations prescribed by the aforesaid recited acts, for the impannelling and summoning a jury, then it shall and may be lawful for the party so having given notice himself, to send a request in writing to the sheriff or sheriffs, or under-sheriffs, bailiff, or his under-bailiff, respectively according to the tenor of the above recited act; and the sheriffs and bailiffs so mentioned in the first above recited act shall summon and impannel a jury, and proceed as in the manner prescribed in the above recited act upon the issuing of the warrant of the company."

Sect. 23., after reciting that the extended line of railway was intended to pass through divers streets, &c. and close to

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In the first place, that section has no applic the present case. The words "the sheriff or sh the county or city" must be taken distributive be understood to mean, "the sheriff of the co the sheriffs of the city." In *London* the two she distinct officers; but in *Middlesex*, the two offic constitute one sheriff; *Thompson* v. *Farden*. (*a*)

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divers dwelling-houses, stables and shops which thereby might be greatly deteriorated in value, enacts "that in case the greater part of any such dwelling-house, &c. which shall be situated within fifty feet from the said railway shall be deteriorated in value, and the owner or lessee of any such dwelling-house, &c. shall by notice in writing, to be left at the office of the said company, require the said company to purchase the same, it shall be lawful for the said company, and they are hereby required, within thirty days after the service of such notice, to treat for the purchase of the dwelling-house, &c. mentioned in such notice, and for the compensation, recompense or satisfaction to be made to such owner or lessee for any loss, damage or injury in respect of any tenant's fixtures, improvements, or otherwise occasioned by the taking thereof; and, in case the party so giving such notice and the said company shall not agree as to the value of such dwelling-house, &c. or as to the amount or value of the satisfaction, recompense or compensation to be paid for such improvements, tenant's fixtures, or otherwise, then the amount of such satisfaction, &c. shall be as and settled by the ver jury in the manner in the said first recited this act, for ascertain settling the value or rec for other lands, &c. to or purchased for the of the said first recite this act; provided alw no party shall be entitl ceive any compensatio the above enactment u jury to whom it shal ferred to ascertain the thereof shall by their determine that the pr respect of which the claimed has been det in value by the constr the said railway: provi that no party shall be to claim any such comp after the period of twelv from the opening of way to the public, nor said company be compe purchase any such pro aforesaid after the p fifteen months from the of the said railway to th &c."

(*a*) *Antè*, Vol. I. p. *Scott, N. R.* 275.; 8 *D C.* 813.

In *Gilb. Hist. C. P* which see 3 *Blac. Co n.*) p. 180., it is said

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present case Mr. *Farncombe* and Mr. *Gibbs* were the two persons who held the office of sheriff of *Middlesex*, and the inquisition was taken before them, but the fact alleged in the plea that one of them was at the time a shareholder in the company, will not prevent the inquisition and the judgment thereon from being good. The other side must contend that they are void upon the ground that *the sheriff* was a shareholder. But Mr. *Farncombe* was not the sheriff. [*Tindal* C. J. There may be a different question as to the inquisition and the judgment. As to the former, the objection now insisted on might be ground for a challenge to the array, but that is expressly taken away in these proceedings by the 6 &

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first beginning of this custom seems to be upon the foundation of the charter of King *John*," (confirming a previous charter from *Hen.* 1. see *Com. Dig.* tit. *London* (G.)) "who granted the sheriffwick of *London* and *Middlesex* to the mayor and citizens of *London* at the farm of 300*l.* per annum; so that being a grant in fee of the sheriffwick to them as a corporation, they had a right to name one or more officers in order to execute the same; and they thought it proper to name two officers indifferently to execute both offices; and both of them execute as one sheriff, though the writ in *Middlesex* is directed to them as one *Vic' Com' Middx. Præcipimus tibi;* in that of *London, Vice-comitibus London' Præcipim' vobis;* and the reason of this difference seems to be, that before this grant of the sheriffwick to the corporation, the corporation nominated to the crown, and the crown appointed the sheriffs for *London*, and the *London* sheriffs were responsible to the king for the *London* profits of the sheriffwick; and that was the reason why two were appointed, that both might be responsible; and this nomination was, that the citizens might exhibit to the king responsible persons; and that seems to be the reason, that in many of the corporations that are cities and counties, there are two sheriffs; but when, by the charter of King *John*, the sheriffwick of *London* and *Middlesex* was granted to the citizens as a perpetual fee-farm, then they entered their sheriffs, which before were nominated for *London* only, and the election of the two was for both sheriffwicks, but the directions of the king's writs were as before, viz. in *London* to the two sheriffs, and in *Middlesex* as if there was only one." And see *Pulling's London*, 131. 2d ed.

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7 *W.* 4. *c.* cxxiii. *s.* 22. The objection to the judgm would rest upon the principle that no man can be judge in his own cause. (*a*)] By the twenty-four section the presiding judge is to sign the verdict a judgment. If there is no valid objection against t inquisition being taken by the sheriff, there can be no against the judgment being given by him.

Again, the acts of parliament are to be constru with, at least, some strictness, against the company. T provision as to the sheriff being a shareholder, o applies to cases where the warrant is issued by t company themselves, under the twenty-second section the first act. That act contained no provision which any other party, except the company, could tain the decision of a jury as to the amount of co pensation. By the twenty-second section of the seco act, parties claiming such compensation, are empower where the company neglect to submit the matter dispute to the determination of a jury, to send a requ to the sheriff, who is thereupon to hold the inquisiti This section presupposes a breach of duty on the p of the company; but it contains no enactment as to t sheriff being a shareholder.

But even supposing the objection were good, t defendants are estopped from availing themselves of by the fact of their having appeared before the sher and having offered evidence upon the inquisition.

The fourth plea sets up as a defence, that the ju have given a verdict in respect of matter for which th were not authorised to award compensation; namely, " certain loss and damage alleged by the plaintiff to h been sustained by him in respect of his said dwellin

(*a*) Ld. C. J. *Hobart* in *Day* v. *Savadge*, *Hob.* 87. goes the length of saying, that " an act of parliament made against natural equity, as to mak man judge in his own cau void in itself." *Sed quære.*

house, by reason of the construction of the said railway;" as well as for loss and damage in respect of good-will, tenants' fixtures, &c.; and that the verdict and judgment were consequently void. But by sec. 23. of the 2 & 3 *Vict. c.* xcv. in cases where any dwelling-house, &c., shall be deteriorated in value, the value thereof and the amount of compensation for tenants' fixtures, &c., is to be ascertained by a jury, who are required to determine that the property has been deteriorated. It is stated in the declaration that evidence was given that the plaintiff's house was deteriorated in value: the proceedings therefore would fall within that section, in which nothing is said about a separate assessment. [*Tindal* C. J. That section says that, "the amount of satisfaction, &c., shall be ascertained and settled by the verdict of a jury in the manner described in the said first recited act;" — that is in the 6 & 7 *W.* 4. *c.* cxxiii.; — and by the twenty-second section of that act, the satisfaction for good-will, &c., is to be "assessed separately and distinctly from the value of the lands."] At all events, the non-compliance with the direction as to separate assessment will not vitiate the proceedings; *In re The London and Greenwich Railway Company and the Sheriff of Surrey.* (*a*) The plea does not raise any point as to the proceedings being merely *defective*; the defendant therefore can only rely upon such objections as would be available to him upon general demurrer to the declaration.

As to the second count, which is for the costs of the proceedings, the defendants will contend upon general demurrer, that the plaintiff is not entitled to costs, inasmuch as sect. 23. of the 2 & 3 *Vict. c.* xcv. is silent as to costs. But they are expressly given by sect. 27. of the former act, the provisions in which section are

(*a*) 2 *A. & E.* 678.; 4 *N. & M.* 458.

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incorporated into the latter act, by the co words of the twenty-second section thereof.

Bompas Serjt. (with whom was *H. Hill*), fo fendants. As to the mode of assessment it is that it sufficiently appears upon the face of the tion, that there was an entire assessment. At no where shewn that there was a separate as [*Maule* J. Need the fact that there had been a assessment distinctly appear? The jury might separate sums and add them together in thei *Non constat* that this was not done.] It app the plea that one sum only was assessed. Th expressly requires a separate assessment; and will not presume that such an assessment w unless it be distinctly stated to have been so do jury had no power to give both purchase m damages in respect of deterioration for the sa [*Maule* J. That is to say, that if a house was worth 20,000*l.*, and had been deteriorated in reason of the railway, so as to be worth only company were to have it for the latter sum.] pay for the deterioration they ought not to p original value of the house as well. [*Maul* the word "value" mean the value before the tion, or after it?] It means the present value at the time the inquisition is taken.

Again, there is nothing in the second act w that the inquisition taken under it is to be There is nothing to compel or authorise the cl peace to keep such inquisition as a record a others. It follows that *debt* will not lie upo inquisition, as upon a record. [*Maule* J. there may be no express provision in the s upon the subject, there seems to be no reaso quisitions taken under it should not as much

as records as those taken under the twenty-second section of the former act.] It is sufficient to say that there are no such provisions in the latter act, and that there are in the former. There is no necessity that the inquisition should be a record; and it is not made one. There is no provision that *debt* may be brought upon the inquisition. The only provision is, that the company shall purchase the lands, &c. [*Maule* J. Suppose the parties had agreed on the amount, and the plaintiff had been ready and willing to make a conveyance of the property as alleged in the declaration, might he not bring *debt?* Is it clear that this action is brought upon the verdict of the jury? May it not be upon an *agreement* between the parties? In that case it is not necessary that there should be any record. Then, may not the statement as to the deposit of the verdict and judgment among the records, be rejected as surplusage? And would not the declaration then disclose a sufficient cause of action?] It is submitted that it clearly appears from the whole of the declaration, that the action is brought upon the verdict and judgment. The request to pay is laid — not after the averment of readiness to convey — but after the allegation, that the judgment was unsatisfied.

As to the objection that, the sheriff being an interested party as a shareholder, the writ ought to have gone to the coroner, it is said that the act does not apply, inasmuch as only one of the persons who constitute the sheriff was so interested. But an interest in one is sufficient to disqualify both from acting. Where there are two distinct sheriffs, and one is interested in the subject matter of an action, the process may be directed to the other, and ought not to go to the coroner; *Letsom* v. *Bickley*. (*a*) But in *Middlesex*, where

(*a*) 5 *M. & S.* 144.

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both the individuals make one, if one of them were plaintiff in an action, it is clear the writ must go to the coroner. They must both act together; and therefore in this case the interested moiety of the sheriff must act with the other. The other side must contend, that *in Middlesex* the provisions of the act upon this point could never be applicable unless both the parties who constitute the sheriff were shareholders. If the argument on the part of the defendants is correct, the whole proceedings were *coram non judice*, and void; and therefore there can be no waiver.

With regard to the second count, this is clearly not a case in which costs can be recovered. The twenty-seventh section of the 6 & 7 *W.* 4. *c.* cxxiii. gives costs only in three cases, within none of which does the present case fall. And there is nothing in the latter act to entitle the plaintiff to costs. Even if he were entitled to them, he could not recover them by action. His only remedy would be by distress under the former act.

Channell Serjt. in reply. The third plea sets up new matter, which is introduced by the defendants in avoidance of the liability alleged by the plaintiff. Now the defendants, in order to bring the case within the act, were bound to shew that *the sheriff* was a shareholder, which they have not done. It is argued that there is nothing in the twenty-second section of the second act requiring the judgment to be made a record. Neither is there in the corresponding section of the former act, namely, the fifty-first, which is identical in its purpose and language with the twenty-second of the latter act; yet it could hardly be contended that a judgment under the fifty-first section would not be a record. That section must be read in conjunction with the twenty-second of the latter act; the object of both of them being to provide for cases in which a party is act-

ing hostilely to the company. By the twenty-fourth section of the former act, the judgments obtained under the twenty-second section of the same act are to be entered of record; and there can be no reason why such judgments should be so entered, and others obtained before the same tribunal, and relating to the same subject-matter, should not be. The whole of the clauses of the two acts must be taken together, as giving power to the sheriff to hold the inquisition. Besides, the first section of the second act incorporates the powers and provisions of the first act, except where they are expressly repealed, or are inconsistent with the second act. There is therefore an incorporation of all the provisions as to giving judgment and making it a record. It has been argued that the first count of the declaration is bad upon another ground, — that it does not expressly shew a separate assessment; but at any rate it is sufficient upon general demurrer.

With regard to the second count, it is said that costs are not recoverable under the acts; but the fifty-first section of the former act, and the twenty-second of the latter, were intended to incorporate all the machinery relative to the inquisition. It never can have been intended by the twenty-seventh section of the former act, that costs should be given against the company in a case where they *could* not treat with a party, by reason of his being abroad—and not in a case where they *would* not treat, as in the present. The legislature could not have meant that where a party recovers more than the company have offered, and the company are contumacious and will not treat with him, he is not to have his costs. The two pleas are pleaded each to the whole action. The defendants can only take such objections as would be open to them upon a general demurrer to the whole declaration, and then the demurrer would be too large,

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as only one count is objected to; *Boydell* v. J *Ferguson* v. *Mitchell* (*b*); *The Parrett Navigation* (v. *Stower*. (*c*) [*Tindal* C. J. Might not the co judgment for the plaintiff on a good count, and defendant on a bad count? May not the dem taken *distribuendo?*] Not, it is submitted, whe is a general demurrer to the whole declaration. (*Cur. a*

TINDAL C. J., now delivered the judgment court.

The plaintiff in this case declared in an action stating in his declaration, the formation of the under the statute 6 & 7 *W.* 4. *c.* cxxiii., that th tiff was lessee of certain premises for a certain years, within fifty feet of the railway, and that, son of the construction of the railway, his prem been greatly deteriorated; that within the period c months, he gave notice in writing that he was i treat for the sale of the same to the company; company would not, within thirty days after the treat for the purchase of his interest, or for th pensation or satisfaction to be made to him damage in respect of his good will, tenant's fixtu provements, or otherwise, or agree with him value of his interest; that, after the expiration thirty days, he requested the company to issue rant, and to submit the matter in dispute to th mination of a jury; that the company did no

(*a*) 4 *M.* & *W.* 446.

(*b*) *Tyrwh.* & *G.* 179.; 2 *C. M.* & *R.* 692.; 4 *Dowl. P. C.* 513.

(*c*) 6 *M.* & *W.* 564.; 8 *Dowl. P. C.* 405.

(*d*) The doctrine that an entire demurrer to a d containing a good as bad count shall be ov too large, appears t abandoned. *Vide ant* 201., Vol. III. 119. v. *Hill*, 10 *M.* & *W.*

within twenty-one days, and thereupon the plaintiff sent his request in writing to the sheriff of *Middlesex*, to summon a jury to inquire and assess the sum of money for the purchase of his interest, and for the compensation to be paid him by the company for his damage, in, and otherwise occasioned by, the taking thereof. The declaration then sets out the inquisition taken in pursuance thereof, before *Thomas Farncombe* and *Michael Gibbs*, Esquires, then being *sheriff* of the county of *Middlesex*, in which the premises lay; that the jury were duly impannelled; that the plaintiff and the company appeared before the jury by their counsel; that the jury found that the dwelling-house, before and at the time of the notice to purchase, was deteriorated in value by the construction of the railway, and assessed and gave their verdict for the sum of 250*l.*, for the purchase by the company of the plaintiff of his said interest, and also by way of recompense and compensation for all damages in respect of the tenant's fixtures of the plaintiff in the said dwelling-house, or in other respects whatsoever; that the said sheriff gave judgment for the said sum so assessed by the jury; that the verdict and judgment were duly signed and properly deposited, as required by the act; that the plaintiff was ready to convey and to make title; of all which premises the defendants had notice, and that the plaintiff had not obtained payment, although the company had been requested to pay: by reason whereof an action had accrued, &c., to recover the said sum. The declaration contained a second count, for the costs and charges of the proceedings which the plaintiff had taken under the act.

The defendants pleaded — thirdly, that *Thomas Farncombe*, at the time of the request so made to the sheriff of *Middlesex*, and from thence to the time of holding the inquisition and giving the judgment, and of settling and determining the costs &c., was, and continued to be, a

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shareholder in the said company, by means whereof the inquisition and judgment, and the determining of the costs, charges and expenses, were wholly void; and the defendants further pleaded, that, at the holding of the inquisition, the plaintiff adduced evidence, not only of the loss and damage in respect of the good will, tenant's fixtures, improvements, or otherwise, but also of loss and damage in respect of the dwelling-house by reason of the construction of the railway; and that the jury assessed and gave their verdict for the said sum of 250*l.*, for the purchase of the plaintiff's interest in the dwelling-house, and also by way of satisfaction, recompense, and compensation for the several losses and damages in that plea mentioned; and that by reason thereof the inquisition and judgment are void.

To each of these pleas the plaintiff demurred specially; and the defendants joined in demurrer.

With respect to the objection raised by the third plea, even admitting that the twenty-second section of the prior act applies to the case where the office of sheriff is constituted and composed of two persons, as in the sheriffwick of *Middlesex*, and where one only of such persons is a shareholder, yet we think the present case does not fall within the scope and object of that section, or within the provision therein contained. That section contemplates the case where the company issue their warrant to summon a jury, and the sheriff is a shareholder in the company; and in that case enacts that the warrant of the company shall not go to the sheriff, being one of their own shareholders, but to the coroner. It is very reasonable, that, where the company issue the warrant, as they must know beforehand, from their own books, whether the sheriff is a shareholder or not, they should not be allowed to send such warrant to one of their own body, and thereby, in effect constitute one of the individuals of whom the compan

is composed, and who may be presumed to be interested in their favour, to be a judge in their own behalf. But the present case falls within, and is governed by, the twenty-second section of the subsequent act, 2 & 3 *Vict.* c. xcv., being a case in which the company have declined or neglected to issue their warrant within twenty-one days after request made by the party for that purpose, and in which the claimant is authorised to send his request in writing to the sheriff to summon the jury. The party has no means of knowing whether the sheriff is a shareholder or not; accordingly in this clause there is no provision made in case of the sheriff being a shareholder, as in the former act. We think, therefore, the answer to be given to the objection raised by the statement in the third plea, is, that this case does not fall within the provision of the former statute: and, if so, that the impanelling of the jury and the other acts done by the sheriff of *Middlesex* cannot be considered as void. And, supposing them to have been voidable, if objected to at the proper time, we think the company have waived any objection, if such could have been made by them, by appearing before the sheriff and jury, and allowing the inquisition to proceed, and the judgment to be given thereon: for, the objection itself, that the sheriff was a shareholder, and, therefore, interested in the behalf of the company, would be an objection taken by them to a matter in their own favour; and it would be unreasonable that they should lie by and await the result of the proceedings, and raise no difficulty until after they have seen the inquisition, and can determine whether or not it is satisfactory to themselves. We, therefore, think that the objection, if it could ever have been taken, at all events comes too late, and that the third plea is bad in law.

The fourth plea raises the objection to the inquisition, that evidence was given before the jury, not only of the

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loss and damage in respect of good-will, tenant's fixtur and otherwise, by the taking of the dwelling-hou but also of loss and damage sustained in respect of t dwelling-house by reason of the construction of t railway: and it was urged in argument, first, that t plaintiff had adduced such evidence before them; an secondly, that the sum assessed by the jury was co posed of damages given in respect of both those groun of injury. But we cannot see how the mere fact of t plaintiff's adducing such evidence before the jury, a the receiving thereof by the sheriff, can of itself aff the validity of the verdict; for such evidence may ha been given to shew that the house had been deteriorate which was necessary to give the jurisdiction to t sheriff and jury: and, as to the objection, that the su assessed comprises damages given for injury to t premises by the construction of the railway, we thi we must take the inquisition as it is set out upon t face of this declaration, which gives a verdict for t sum of 250*l.* "for the purchase of the house by th company, and also by way of satisfaction, recompens and compensation for all damage in respect of t tenant's fixtures of the said plaintiff in the said dwelling house, or in other respects whatsoever;" thereby ex cluding any damages given for the deterioration of th house by the original construction of the railway.

The objection is then raised, that, by the twenty second section of the former statute, it is expressly pro vided that the jury shall assess, and give a verdict fo the sum to be paid for the purchase of the lands, an also the sum of money to be paid by way of satisfa tion, recompense or compensation for good-will, &c and also, "that the satisfaction, recompense or co pensation for such damage or loss shall be inquir into and assessed separately and distinctly from t value of the lands so to be taken or used as aforesai

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The question therefore is, whether the words just adverted to are compulsory, and in the nature of a condition, so that, if they are not observed, the inquisition and subsequent judgment are to be held void, or whether they are directory only, so that the company or the claimant might have called upon the sheriff to keep the evidence distinct as to the value of the premises, and the satisfaction for damage, and to find and adjudicate a separate sum in respect of each. And we think those words directory only. There are no expressions in the statute which require them to be construed as words of condition, or which shew such intention on the part of the legislature; and they are not to be construed to avoid the proceedings, unless such appears the necessary construction. And the court of Queen's Bench, in the case, *In re The London and Greenwich Railway Company* (*a*), which arose upon a precisely similar clause of another statute, considered these words to be directory only, and that the company could not treat the verdict as a nullity, it being the duty of the company to have called upon the jury at the time to make a separate assessment of the value and of the damages, which they had not done.

We therefore think, that, notwithstanding the objections raised by both the pleas, the plaintiff is entitled to judgment on the first count.

As to the second count, which is brought for the costs, charges and expenses which are alleged to have been duly settled and determined by the said sheriff, pursuant to the acts, at a certain sum, to be paid by the company to the plaintiff, who, by reason of the premises in the first count mentioned, had been prevented from treating and agreeing, we think the act has not provided for the case now under consideration. The only

(*a*) 2 *A. & E.* 678.; 4 *N. & M.* 458.

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clause which gives costs and charges, is the twenty-seventh section of the earlier statute; but that appears to be limited to the case where the company are compelling the owner of property to sell or to accept satisfaction for damages. That section provides for three cases — where the jury shall give the same or a greater sum than the company have previously offered — where the verdict of the jury is given for a less sum — and where, by reason of absence in foreign parts, or from any other cause or disability not thereinbefore provided for, any person shall have been prevented from treating and agreeing as aforesaid. But the present case does not appear to us to fall within either of the classes above set forth: clearly not within either of the two classes which are first enumerated; nor within the last which, by the instance specified, cannot be contended to comprehend the case of a simple non-agreement, on the ground that the company will not treat or agree; but some cause or disability independent of the mere agreement of the parties themselves. The twenty-second section of the statute 2 & 3 *Vict. c.* xcv., which first enables the claimant to enforce the proceedings before the sheriff's jury against the company, is silent altogether on the subject of costs, except by the words of reference at the end of that section; which words, at most, apply only to the three cases enumerated in the twenty-second section of the former act, amongst which the present case does not fall.

We think, therefore, the plaintiff is entitled to judgment upon the first count, and the defendants to judgment in their favour on the last count of the declaration.

Judgment accordingly.

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The 33d rule of *H.* 2 *W.* 4., which requires applications to set aside proceedings for irregularity to be made in a reasonable time, was held to apply to prisoners as well as to other persons.

THE rule for a new trial, obtained by the defendant in this case, having been discharged with costs in last *Easter* term (*a*), the costs were taxed, and the defendant was taken in execution in *May* 1842, since when she had remained in custody.

Bompas Serjt. on a former day in this term (*January* 16th) obtained a rule, calling upon the plaintiff to shew cause why the master should not review his taxation, and why the judgment and all subsequent proceedings had thereon should not be set aside for irregularity, upon the ground that the defendant had not received any bill of costs, or notice of taxation.

Talfourd Serjt. now shewed cause. The application is much too late, under the thirty-third rule *H.* 2 *W.* 4. (*b*), which applies to prisoners as well as to other persons; *Primrose* v. *Baddeley.* (*c*) Although in *Taylor* v. *Slater* (*d*), the rule was considered not to apply so strictly to prisoners; yet the lapse of time here has been quite unreasonable. [*Tindal* C. J. The irregularity suggested was merely the want of notice of taxation. The taxation

(*a*) *Antè*, Vol. IV. p. 143.; 4 *Scott, N. C.* 796.

(*b*) "No application to set aside process or proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity."

(*c*) 4 *Tyrwh.* 370., 2 *C.* & *M.* 468., 2 *Dowl. P. C.* 350. See also *Robertson* v. *Douglas*, 1 *T. R.* 191.; *Fownes* v. *Stokes*, 4 *Dowl. P. C.* 125., 2 *Scott*, 125.; *Fife* v. *Bruere*, 4 *Dowl. P. C.* 329.; *Fowell* v. *Petre*, 5 *A.* & *E.* 818., 1 *N.* & *P.* 227., 5 *Dowl. P. C.* 276.

(*d*) 2 *Scott*, 839. See also *Rock* v. *Johnson*, *Tyrwh.* & *Gr.* 43., 4 *Dowl. P. C.* 405.

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itself is not complained of. *Cresswell* J. If the judgment is to stand as a judgment, it must stand with all its consequences.] The learned serjeant stated that a similar application had been made to *Coleridge* J. at chambers, and had been discharged with costs; and that the case had also been before *Erskine* and *Cresswell* JJ. at chambers, who had likewise discharged the summons, considering the matter disposed of by *Coleridge* J.

Bompas Serjt. in support of the rule, suggested that the defendant may have been prevented by poverty from making an application by counsel; and, that being a prisoner, she had not been able to apply in person. [*Tindal* C. J. She might have come up by *habeas*. I cannot see how we can have one rule for one class of persons, and a different rule for another.] The fact of the defendant having made frequent applications at chambers, shews that she did not sleep upon her right.

TINDAL C. J. The rule is a general one, that an application like the present must be made in a reasonable time. This is clearly not made in a reasonable time—it is much too late. The rule must be discharged.

ERSKINE J. The case was fully heard by *Coleridge* at chambers. It is not too much to expect parties attend to the rule of court.

CRESSWELL J. We could not make this rule absolute without doing injustice to the plaintiff.

Rule discharged.

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ASSUMPSIT. The first count was for the licence, consent and permission of the plaintiff, before then given and granted to the defendant to erect, set up and apply and use in divers ways and on divers occasions and purposes, a certain patent invention whereof the plaintiff was the owner and proprietor, that is to say, a certain invention called *Chanter* and Co.'s patent furnace, and to use and apply the same for the use and benefit of the defendant; which patent invention the defendant had then, in divers ways &c., erected &c., and applied to his own use and benefit, under and by virtue of the said licence and permission. There were also counts for goods sold, for work and materials, and upon an account stated. Plea: non assumpsit.

At the trial, before *Tindal* C. J., at the sittings in *London* after *Michaelmas* term last, the plaintiff having abandoned the first count, tendered in evidence the following document, which was a printed form, filled in with names and dates, and with certain alterations and interlineations.

" No. 1. (*a*)

To Mr. ~~*Nicholas Hoyle*~~

Send *me* a License to use *two* of
Chanter & Co.'s patent *furnaces*
to be applied to *a singe plate*
and cloth boiler

A memorandum as follows: — " Send me a licence to use two of *A.*'s patent furnaces to be applied to a singe-plate, &c., for which I agree to pay, as agreed, 25*l.* as a patent-right, and which is to include iron works, fire-bricks, and labour; engineers' or furnace-builders' time to superintend or fix the above order, to be paid 6*s.* per day:"

Held to be either an agreement, or an acceptance of a previous proposal, and therefore to require a stamp:

Held also, that it was not within the exemption in the stamp act, as relating to "the sale of goods, wares, or merchandize," as either the primary object of the agreement was the licence, or it was an agreement for the erection of fixtures.

(*a*) The words in *italics* were written in this document; the others were in the printed form.

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for which *I* agree to pay Mr. Chanter or hi
order, ~~the terms of printed list hereunto an~~
as ag., *Twenty-five pounds* as a patent right
which is to include iron works, fire bricks an
" Signature *Nath^l. Dickinson.*
" Place *Canal St. Dye Works.*
" Date *June 7th* 1842.
" Remarks *to be paid for Nett Cash*
$in \frac{3}{one}$ *months.*

" Engineers' or furnace-builders' time, to
intend or fix the above order, to be paid six
per day; and all expenses, if the distance excee
miles."

It was objected, that, this being an agreem
subject-matter of which was of the value of upv
20*l.*, a stamp was necessary under 55 *G.* 3. *c.* 184
Part 1. tit. *Agreement.* The Lord Chief Justice r
the point, and a verdict was found for the plain
defendant having leave to move to enter a nonsu

Bompas Serjt. on a former day in this term (
13th) having obtained a rule nisi accordingly,

Channell Serjt. now shewed cause. The docu
question is not an agreement. It is nothing mo
an offer or proposal. It may be treated as be
dressed to no one, since the name of *Nicholas H*
originally existing in the memorandum, has been
out. It was a mere printed form for an orde
ject to its becoming an agreement by acceptan
execution of it in the terms contained in it. In
v. *Brown* (*b*) it was laid down by *Bayley* J., that

(*a*) He was stated to have been the agent for the plaintiff.

(*b*) 3 *B.* & *C.* 665., *R.* 582.

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ontaining a mere proposal, subsequently agreed to y parol, to let land according to terms contained in nother paper that was stamped, was not such an 'agreement, minute or memorandum of agreement" as required a stamp. The expression "as ag." contained in the memorandum in this case, must undoubtedly be taken to mean "as agreed;" but that may merely refer to the price, in case the proposal was accepted. [*Cresswell* J. That would seem to point to a price previously agreed upon, in which case acceptance would make it a complete agreement.] The document was merely a form adapted to ordinary sales, and capable of being altered to meet the particular circumstances of each case. The words "as agreed" would seem to refer to "the terms of printed list" which are struck out; so that the words "as agreed" may mean "as specified," and may be considered to refer to a rate of prices agreed to be substituted for those in the printed lists; and then the instrument on the face of it would not necessarily require a stamp. In *Edgar* v. *Blick* (*a*), which was an action on a parol contract, it was held by Lord *Ellenborough* C. J., that reference might be had to an unstamped document containing a written proposal of the terms of such contract. It may perhaps be contended on behalf of the defendant, that as this document is at least evidence of a contract, it is within the terms of the act; but the same observation would apply to every case of a written proposal followed by a parol acceptance. In *Vaughton* v. *Brine* (*b*) it was said by *Tindal* C. J. that though the words in the stamp act "whether the same shall be only evidence of a contract" &c. would extend to all cases in which recourse is had to any writing as evidence of a contract; still the document must come within the previous

(*a*) 1 *Stark. N. P. C.* 464. (*b*) *Antè*, Vol. I. p. 359., 1 *Scott, N. R.* 258.

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words "minute or memorandum of agreement." [*Erskine* J. The document in that case was neither a contract obligatory upon the parties, nor a memorandum of contract between any parties. *Tindal* C. J. The difficulty here lies in the precise words in the document — "I agree" and "as agreed" — can they point to any thing but a former agreement?] There is no evidence of any previous negotiation. It is not disputed that wherever a contract is reduced to writing it must be stamped; and even where the terms of a parol agreement are subsequently reduced to writing, so as such writing is to be available as evidence, it would require to be stamped; but the document here it is submitted is a mere preliminary proposal.

But admitting the instrument to be an agreement, it falls within the exemption in the stamp act, being an agreement, "for, or relating to, the sale of goods, wares or merchandize." It has especial reference to the sale of the furnaces, and not merely the licence to use them. A patentee may grant a licence to other parties to use the principle of his patent; and in such case he would be estopped from bringing an action for the infringement of his patent; but the sale of a patent article by the patentee necessarily confers on the vendee, not only the right to use the article himself, but to transfer it with the same right to third parties. It amounts to a licence to all the world to use the article sold; but it is not a licence to use the principle of the patent. [The learned serjeant referred to the argument in *Minter* v. *Williams.* (*a*)] The licence mentioned in the paper does not mean a licence in the ordinary sense of the word. The expression "to be applied to a singe plate" &c., shews that the furnace itself rather than the licence was meant. [*Tindal* C. J. That expression seems rather to point

(*a*) 5 *N.* & *M.* 64.

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he kind of article that was wanted, by shewing the ose to which it was to be applied.] Even if the iorandum embraces the licence, it primarily relates ie furnace, which is a thing within the exemption of stamp act. This more clearly appears from the exion "the 25*l.* to include iron works, fire-bricks labour." If an agreement is substantially for the chase of goods, it is immaterial that an incidental tter, such as a licence, is also stipulated for. In *ering* v. *Duke* (*a*), it was held that an agreement for sale of a ship did not the less relate to the sale of ds, on account of its containing stipulations, that part he purchase money should remain on mortgage; and t the vendor should procure a charter for the vessel, "The mere circumstance," said Lord *Tenterden* C. J. f other matters connected with the principal object ng introduced, does not take the instrument out of exemption. They are the terms of the agreement the sale, but the instrument is not less an agreement the sale of goods." In *Smith* v. *Cator* (*b*) the same rned judge stated the rule to be "that stamps are t required for those instruments in which the sale of ds is the primary object." In *Curry* v. *Edensor* (*c*), same principle was acted upon, in reference to the n existing stamp act, the words of which were silar to those of the act now in operation.

It may be contended on the other side that the furaces which are the subject-matter of the agreement, are xtures, and, therefore, not "goods, wares and merhandize" within the meaning of the stamp act; but hose words are to receive a liberal construction; as in *larson* v. *Short*. (*d*) The memorandum at the foot of

(*a*) 2 *M. & R.* 121.
(*b*) 2 *B. & A.* 778.
(*c*) 3 *T. R.* 524.
(*d*) 2 *New Ca.* 118., 2 *Scott*, 243.

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this instrument is not to be taken as a part of the agre ment. It appears to have been left in by accident. E in any point of view a contract as to the "labour" "time" necessary to fix a chattel, will not make chattel a fixture. In *Hughes* v. *Breeds* (*a*), it was h that part of the terms of an agreement for the sale goods being "to finish them in a workmanlike manner did not render a stamp necessary. In *The West Mi dlesex Water Works Company* v. *Suwerkropp* (*b*), it w held that an agreement to supply a house and building with water by means of pipes, to be laid in a certa manner, and to a certain height, was an agreement n lating to a sale of goods, and need not be stamped. is only fixtures in the strict sense of the word—that things necessarily affixed to the freehold—that are n within the exemption in the stamp act; *Wick* v. *Hod son.* (*c*) But even tenant's fixtures may be treated goods and chattels; *Poole's case* (*d*), *Pitt* v. *Shew* (*e Hallen* v. *Runder.* (*g*) [*Erskine* J. In *Pinner* v. *Arnold* (*h* which was an action upon a contract to sell and deliv a printing-press of the plaintiff's manufacture, *Parke* said, "If it had appeared that part of the contract w to fix it to the floor or the walls of the defendant house, I should have doubted whether it was a contra for the sale of goods within the meaning of the act, b cause that would be the same in principle as a contra to erect a pillar."] That was at most an *obiter dictu* If a party purchases curtain-rods or a pier-glass to fixed by the vendor, it would not the less be a co tract for goods; the work and labour would be incident to the sale of the article. The defendant here might, he had thought fit, have himself fixed the furnace.

(*a*) 2 *C. & P.* 159.
(*b*) *Moo. & Malk.* 408.
(*c*) 12 *J. B. Moore*, 213.
(*d*) 1 *Salk.* 368.
(*e*) 4 *B. & Ald.* 206.
(*g*) 1 *C. M. & R.* 266.
(*h*) 2 *C. M. & R.* 6 *Tyrwh. & G.* 1.

Bompas Serjt., in support of the rule. The whole tenor of the memorandum in question shews that it amounts to an agreement, and is not merely an order or proposal. If it is an agreement it cannot be said to relate to the sale of goods. A furnace is not a manufactured article ready for delivery, as a boiler. A furnace is, in fact, manufactured in the setting up. The substance of the present agreement is for the patent right. In *South* v. *Finch* (*a*), it was held that an agreement for the sale of goods and the good-will of a business, required a stamp. That is a much stronger case than the present, since in that case the estimated value of the good-will, formed but a small part of the amount; but in this case the licence is the primary object, as expressly appears by the declaration. [*Channell* Serjt. The first count was given up at the trial, and the plaintiff proceeded upon the count for goods sold.]

The cases cited on the other side relate solely to the sale of goods. The present agreement, which appears on the face of the two documents, is not an agreement for the sale of goods. It is therefore within the provisions of the stamp act, and the *onus* lies upon the plaintiff to take it out of their operation.

TINDAL C. J. The first question in this case is, whether the document under consideration amounts to an agreement; for if it is only a proposal or a mere order it will not require a stamp. I think it is impossible to read the document without seeing that it amounts to an agreement. It seems that the parties had previously met and agreed on a stipulated sum as the price to be paid. The words being "send me a licence to use two of *Chanter* and Co.'s patent furnaces, to be applied to a singe-plate and cloth boiler, for

(*a*) 3 *New Ca.* 506., 4 *Scott*, 293.

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which I agree to pay Mr. *Chanter* or his order agreed, 25*l.* as a patent right." Now this amounts statement, that the defendant holds himself bound an agreement to pay a stipulated price for the th mentioned. *Primâ facie*, therefore, this is a docu requiring a stamp; and it lies on the plaintiff to shew the matters contained in it are such as fall within exceptions mentioned in the stamp act, which are fined to "memorandum, letter or agreement mad or relating to the sale of any goods, wares or chandise." Then, the question is — does this a ment relate to the sale of any goods, wares or chandise? In the first place it seems like a stipul for leave to use the subject matter of the order. defendant says, "send me a licence for two of *Ch* and Co.'s patent furnaces," for which he agrees to pay "as a patent right." Now, I cannot see why these w were left in the memorandum, unless it was inte that the party should be at liberty to use the furnace patent right; that is, that he might repair or refix t if they got out of order, without being liable to patentee for an infringement of his patent. It appea be an agreement for a licence to put up a furnace the plaintiff's principle. If it were a purchase of a nace itself, no licence to use it would be required; would be a purchase of the patent article *and* o licence to use it, at the same time. But further, loo at the nature of the things to be used, I think cannot properly be said to fall within the descripti "goods, wares or merchandise." They were fur "to be applied to a singe-plate and a cloth-boi and it appears, from the whole of the agreement, they were to be fixtures. The sum agreed upo "to include iron-work, fire-bricks and labour" stipulation not referable to a ready-made article, one which might be rendered serviceable without

labour: on the contrary, it appears that something was to be done on the premises before the articles could be used. This is evident from the memorandum at foot, which we are entitled to look at. It provides that "engineers' or furnace-builders' time, to superintend or fix the above order is to be paid 6*s.* per day; and also expenses, if the distance exceeds three miles." This shews that it was not work to be done *instanter* and with little labour; that it was not merely an agreement for the sale of goods, but for work to be done by the plaintiff upon the premises of the defendant, whereby furnaces were to be put up on a particular plan. This brings the case within the principle of *South* v. *Finch* (*a*); and the rule for entering a nonsuit must therefore be made absolute.

COLTMAN J. I think the case is free from doubt. The document in question, clearly has reference to some former agreement with an agent, or to some previous offer, in which case it is an acceptance of such offer.

Then the question is, whether it falls within the exemption in the stamp act. The primary object of this contract seems to be, the purchase of the licence and not of the patented article. It is a contract for the right to make use of a patent machine. But, independently of that, I think the subject matter of the contract has not been shewn to be "goods, wares or merchandise," so as to support a count for goods sold. Work and labour were to be done before the article was available; indeed the thing itself had apparently no existence at the time.

ERSKINE J. I also am of opinion, that the rule must be made absolute. The statute imposes a duty

(*a*) 3 *New Ca.* 506., 4 *Scott*, 293.

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upon every "agreement, or minute, or mem of agreement, &c., where the matter thereof sh the value of 20*l.* or upwards, whether the same only evidence of a contract, or obligatory upon ties from its being a written instrument." It i has been decided that these words, general as do not include every written minute that may as a link of evidence of a contract; and, there a mere proposal in writing to enter into a cc not within their operation. But, looking at th it is clear that it must be taken, either as a obligatory on the defendant, or as evidence of ing contract previously entered into. It sh some previous arrangement had taken place, be considered, at the lowest, as a minute of agreement. As such, it requires a stamp, unle any of the exemptions of the stamp act. Tl said, that it relates to the sale of goods. If it a contract for the purchase of a grate to be fix is nothing to shew that such a document would stamp, except the doubt expressed by *Parke* case of *Pinner* v. *Arnold*. I should not, I con any great doubt myself on such a point, since chase of the grate would be the principal thing, work and labour, in fixing, it would be merely tal. Here, I should say from the terms of the ag that the work and labour were the principal t any rate it is for the plaintiff to shew that it i The meaning of the contract appears to me to the defendant writes to the plaintiff, "inasmu cannot use furnaces according to your patent ri out a licence, I will give you 25*l.* to erect two This is quite beside any question as to a sale of

CRESSWELL J. I am entirely of the same *Drant* v. *Brown* is certainly an authority for th

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sition that a mere proposal does not require a stamp; but I think the document in this case does not bear that character. This is an absolute order; and I cannot adopt the ingenious suggestion of my brother *Channell*, that the words "as agreed" may mean as agreed in the printed list, which latter words are struck out. I am of opinion that it amounts to a written acceptance of a previous proposal; and that therefore a stamp was necessary.

It is said that the case comes within the exemption in the act as to sales of goods, &c. But it appears to me not to be a contract for the purchase of any thing; certainly not of any goods or chattels. Upon the face of the document, it rather bears the appearance of being an order for a licence or privilege to use a patent article, and not a purchase of any specific article. But even if we take it to be a contract for the purchase of two furnaces, what is there to shew that these furnaces were goods and chattels? It appears that they would have to be erected on the defendant's premises. A furnace has not an independent existence, to be sold as a chattel; it has to be erected and fixed on the freehold.

Rule absolute. (*a*)

(a) See also *Lucas* v. *Beach*, *antè*, Vol. I. p. 417.

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DREW and Another *v.* J. PRIOR, T. F. and J. SALISBURY.

In an action on a joint and several promissory note against *A.*, *B.*, and *C.*, the only evidence as to the handwriting of *C.* was a retainer to the attorney to defend the action, bearing the signatures of all three defendants, upon which the attorney had acted, without having ever seen *C.*, or being acquainted with his handwriting: Held, there was no evidence of the writing of *C.*

THE declaration contained two counts on t and several promissory notes made by fendants, and also a count upon an accoun

Pleas: — To the first two counts, by *J. P Salisbury* that they did not make the notes; *Prior* a discharge under the insolvent act. residue, by all three defendants, the general iss

At the trial before the undersheriff of *Bedford*, the brother of the first two defendants and the in-law of the defendant *Salisbury* was called the handwriting of the respective defendan witness swore to the signature of his two brot stated that he had no belief as to the handw *Salisbury*. The attorney for the defendants called. He stated that he had never seen *Sali* was not acquainted with his writing; but that t dertaking to defend the present action he had r retainer signed by all three defendants; and th received a retainer purporting to be signed b defendants, upon which he had acted.

The undersheriff was of opinion that ther evidence of the handwriting of *Salisbury*, and th was nonsuited.

Talfourd Serjt. now moved to set aside th and for a new trial, submitting that there wa some evidence of *Salisbury*'s handwriting. Th undertook the action on the authority of a ce nature, and he was quite competent, therefore as to whose signature it was.

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TINDAL C. J. *Non constat* that the signature to the retainer was that of *Salisbury*. If he had acknowledged the signature to the attorney after the latter received the retainer, there might have been some ground for the motion; but as the case stands, the two other defendants might have signed the retainer for *Salisbury* with his assent. That might have been sufficient as an authority to the attorney; but the question is as to *Salisbury's* handwriting.

ERSKINE. J. Suppose the issue had been, whether the signature to the retainer was in *Salisbury's* writing, the evidence would not have sufficed to prove that it was. And that was a necessary point for the plaintiff to prove in this case.

The other judges concurring,

Rule refused.

Talfourd Serjt. then moved upon affidavits, upon which a new trial was afterwards granted.

SOPHIA FLETCHER, Administratrix, &c., of JOHN FLETCHER, deceased, *v.* WILLIAM LECHMERE. *Jan. 23.*

THE defendant in this case had pleaded in abatement his privilege as an attorney of the court of Queen's Bench; the plea being intituled "*Lechmere* ats. *Fletcher* administratrix, &c." and the affidavit in verification being headed "between *Sophia Fletcher*, administratrix, &c. plaintiff, and *William Lechmere*, defendant."

An affidavit verifying a plea in abatement, was headed "Between *S. F. administratrix* &c., plaintiff, and *W. F.* defendant." Held bad, as not shewing in what character the plaintiff was administratrix.

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Channell Serjt. on a former day in this term obtained a rule *nisi* to set aside the plea for irregularity, upon the ground that the affidavit ought to have shown how the plaintiff was administratrix. He cited *Poole* v. *Pembrey* (*a*), *Steyner* v. *Cottrell* (*b*), *Phillips* v. *Hutchinson* (*c*), and *Clark* v. *Martin*. (*d*)

Bompas Serjt. now shewed cause. The heading of the affidavit is, in effect, the same as the title to the plea. *Steyner* v. *Cottrell* and *Phillips* v. *Hutchinson* have established that it is not sufficient to call a plaintiff "assignee, &c." in the heading of an affidavit, upon the ground that it ought to appear what kind of an assignee the plaintiff was. [*Maule* J. He might be an assignee of a bankrupt, of an insolvent, or of a sheriff.] No such difficulty arises in this case. In *Clark* v. *Martin* the marginal note states that the court declined to act upon an affidavit which was entituled "*A.* v. *B.* executor, &c." without specifying the party of whom the defendant was the executor. But it may be doubted whether the case quite bears out that statement. The objection was raised to an affidavit upon which a rule for judgment as in case of a nonsuit had been obtained; and *Parke* B. observed that "assignee" was more vague than "executor" because a party may be assignee in various ways; and that the master informed him that an affidavit intituled like the one under consideration was very common; he however advised the defendant to accept a peremptory undertaking, which was accordingly done. His lordship therefore seems to have thought the title of the affidavit was sufficient, as, if it had been bad he would not have proposed a peremptory undertaking. [*Erskine* J. Why should he do so, if the affidavit was

(*a*) 3 *Tyrwh.* 387., 1 *Dowl. P. C.* 693.
(*b*) 3 *Taunt.* 377.
(*c*) 3 *Dowl. P. C.* 20.
(*d*) *Ibid.* 222.

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good? It was the plaintiff's affidavit. *Cresswell* J. It is clear that *Parke* B. persuaded the defendant to act as though the affidavit were bad.] In *Free* v. *White* (*a*) a writ of summons described the plaintiff "executor," not stating that he sued as executor. The declaration was general, without such description; and it was held no variance. If "executor" is a sufficient description, so is "administrator," for they both stand on precisely the same footing. [*Tindal* C. J. Not exactly. A party may be an administrator *de bonis non*, or *durante minore ætate*, or for a limited time, as while the executor is abroad, or in various other ways.] It is submitted that an indictment for perjury might be sustained upon this affidavit, if false, as it is an affidavit in the cause, and headed substantially in the same manner as the plea. [*Tindal* C. J. In an action against several defendants, a *plea* headed "*C. D.* and others ats. *A. B.*" would be sufficient; but in the *title of an affidavit* the names of all the defendants must be mentioned.] At all events the court will allow the affidavit to be amended and resworn, as in *Cooper* v. *Talbot*. (*b*)

TINDAL C. J. In cases of this nature we ought to endeavour to lay down a rule of easy application and without any subtle distinctions. I cannot distinguish the present case from those in which it has been held that the mere description of a party as assignee, in the heading of an affidavit, is insufficient. These cases were decided upon the ground that there might be different kinds of assignees. So, there may be administrators under distinct rights, who may have quite different powers. The case of *Clark* v. *Martin* seems rather an authority to the same effect, as the court certainly declined to act upon an affidavit in the heading of which

(*a*) 1 *Dowl. N. S.* 586. (*b*) 7 *Scott*, 345.

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the defendant was merely described as "executo
Now, if such a mode of intituling is insufficient in th
of an executor who can only be so under a will, *a fortiori* is it insufficient in the case of an administr

Bompas Serjt. applied for time to plead.

Channell Serjt. (who was to have supported the submitted that leave could only be granted up usual terms of pleading issually.

Per curiam;

Rule accordingly, the costs costs in the cause.

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WITHERS *v.* SPOONER.

An affidavit in order to ground a motion for judgment as in case of a nonsuit, must state the venue.

A rule for such judgment having been discharged by reason of such a defect in the affidavit, the costs being made costs in the cause, the court discharged upon the same terms rule that had been obtained upon an amended affidavit.

MANNING Serjt. on a former day in this obtained a rule nisi for judgment as in cas nonsuit, upon an affidavit that issue was joined 30th of *May* as of *Trinity* term last; but the ven not stated, and it did not otherwise appear whet cause was a town or a country cause.

Dowling Serjt. now shewed cause (21st *January.* defect in the affidavit is material; as if this is a c cause the application is made too soon; *Ellis* v *bing.* (*a*) [*Cresswell* J. Is not the rule drawn u reading the record? If so that will shew the v

(*a*) *Antè,* Vol. IV. p. 639., *N. S.* 118. See *Hi* 5 *Scott, N. R.* 167., 2 *Dowl.* *Stanley, antè,* Vol. II.

The rule is drawn up merely upon reading the affidavit.

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Manning Serjt. in support of the rule. The court will take notice of its own records. [*Erskine* J. There is no record in court to which we can refer.] The record is supposed to be before the court; and entries are presumed to be made upon the roll *de die in diem*. The affidavit is in the usual form. But whether it is a town or a country cause the application is made in proper time. If the former, a term has been lost; if the latter, an assize. [*Erskine* J. The rule is, that where issue in a country cause is joined in an issuable term, two assizes must intervene before the judgment can be signed. *Cresswell* J. It does not appear that there had been any notice of trial.] At any rate, as the point is a new one, and the defendant may have been misled by the form of the affidavit in the books of practice, the court, if they discharge the rule, will not do so with costs.

TINDAL C. J. I think the defendant is out of court. He comes here for strict law, and he must have it. The court have no means of looking at the record, and the defendant ought to shew where the venue is laid; there is no difficulty in his doing so by affidavit. The rule must be discharged; but as the point is new, the costs may be costs in the cause.

Per curiam;

Rule discharged accordingly.

Manning Serjt. on a subsequent day obtained a fresh rule on an amended affidavit.

Dowling Serjt. shewed cause (28th *January*.) The materials should have been brought before the court on

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the former occasion, as they were then in existence; and not having been so, the court will not allow the matter to be re-agitated; *Reg.* v. *Harland* (*a*), *Saunderson* v. *Westley* (*b*), *Ex parte Hasleham.* (*c*) Besides, as, when the former rule was discharged, the costs were made costs in the cause, there was a sort of compact entered into, which the defendant will not now be permitted to violate.

Manning Serjt. in support of the rule. The former application was made on the usual affidavit, and perhaps rather a hard measure of justice was then dealt to the defendant. Nothing has happened to deprive him of his right to judgment as in case of a nonsuit under the statute.

TINDAL C. J. (After having referred to the master.) It was certainly a new point that was started on the former occasion. The officers of the court say that it is not usual to state in the affidavit whether it is a town cause or not, except after notice of trial. But there would be no end to the business of the court, if motion after motion could be made in this manner. I think this rule also must be discharged; the costs likewise being cost in the cause.

Per curiam;

Rule discharged accordingly

(*a*) 8 *Dowl. P. C.* 323.
(*b*) *Ibid.* 652.
(*c*) 1 *Dowl. N. S.* 792.

1848.

SHORE *v.* BEDFORD.

Jan. 28.

THIS was an action upon the warranty of a horse.

At the trial before the under-sheriff of the county of *Berks*, it was proved that the plaintiff had bought the horse in question from the defendant under a warranty; and that the horse proved unsound. It was contended for the defendant that he had acted in the matter only as the agent of one *Pithers*. Previously to the action being brought, one *Ormond* had been the attorney for the plaintiff, but had never acted for the defendant. The clerk of *Ormond* proved that before action brought, the plaintiff and defendant called together at *Ormond*'s office. The witness was asked what passed on that occasion; the question was objected to by the counsel for the defendant, upon the ground that any statement made by the defendant under such circumstances was a privileged communication; but the question was overruled. The witness stated that the defendant admitted he had bought the horse from *Pithers* for the same price and with the same warranty; that the plaintiff then stated that he would not sue the defendant if he (the defendant) would sue *Pithers*, and that he (the plaintiff) would save him harmless; that the defendant agreed to this, and accordingly instructed the witness to write to *Pithers* for the price of the horse, which he did. The defendant's counsel also objected to the letter being read; but it was received in evidence; and the plaintiff had a verdict for 17*l.*

Talfourd Serjt. on a former day in this term (*January* 14th) moved for a new trial, upon the ground that the evidence of *Ormond*'s clerk had been impro-

A. having a claim against *B.*, they went together to the office of *A.*'s attorney, who had never acted as attorney for *B.* A statement was made by *B.* relating to *A.*'s claim; and it was arranged that the attorney should, on behalf of *B.*, write to a third party in respect of the subject matter of the claim. An action having been afterwards brought by *A.* against *B.*;

Held, that the statement by *B.* was not a privileged communication:

Held also, that the letter, being an act done, might be proved by the attorney.

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perly received; as what took place between him and the defendant was a privileged communication between attorney and client. [*Tindal* C. J. It was more like an admission by the defendant in the presence of the plaintiff's attorney. All that passed in the office was before the time when the letter was written to *Pithers*, and before the time when *Ormond* could be said to have acted in any way as the defendant's attorney.] But if at that time he consulted him as attorney, the communication was privileged. The letter at all events was written in the character of attorney. [*Erskine* J. That was an act done, and therefore not within the rule as to privileged communications. (*a*)] The learned serjeant referred to *Doe dem. Peter* v. *Watkins* (*b*), *Doe dem. Shellard* v. *Harris*. (*c*) [*Maule* J. referred to *Reg.* v. *Avery*. (*d*)]

A rule nisi having been granted,

Channell Serjt. now shewed cause. It may be admitted that the rule as to privileged communications may extend to such as are preliminary to a suit. (*e*) But here the communication was not of that character. The meaning of the rule is, that one party shall not call the other party's attorney to state what he had been told professionally relating to the suit. But here the two parties go together to an attorney, and make a statement in his presence. *Ormond* was not at that time the defendant's attorney, or if he was, the communication was not privileged, as it was made in the presence of the plaintiff. In fact it was an admission made to the clerk of the plaintiff's attorney.

(*a*) See *Doe dem. Jupp* v. *Andrews*, *Cowp.* 845.; *Spenceley* v. *Schulenburgh*, 7 *East*, 357.

(*b*) 3 *New Ca.* 421., 4 *Scott*, 155.

(*c*) 5 *C. & P.* 592.

(*d*) 8 *C. & P.* 596.

(*e*) See *Greenough* v. *Gaskell*, 1 *Mylne & K.* 100.

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Talfourd Serjt. in support of the rule. The attorney's clerk must, of course, be taken to be the same as the attorney; and he was clearly consulted professionally by the defendant. [*Maule* J. If two parties go to an attorney, can what is said by one of them in the presence of the other be considered confidential? *Erskine* J. In *Griffith* v. *Davies* (*a*) it was held that a conversation in which the defendant proposed a compromise with the plaintiff, might be proved by the defendant's attorney who was present at the time.] Perhaps a party who accidentally overheard a conversation between an attorney and his client might be allowed to prove it. But the question here is, whether the attorney is at liberty to divulge a communication made to him. [*Erskine* J. It appears that the plaintiff and defendant having had a misunderstanding, they go to the plaintiff's attorney and come to an arrangement. The only question is, whether they did not go for the purpose of consulting *Ormond* as to the best means of seeing *Pithers*. *Tindal* C. J. It does not appear to me to be at all like a confidential communication.]

Per curiam;

Rule discharged. (*b*)

(*a*) 5 *B. & Ad.* 502.
(*b*) See *Perry* v. *Smith*, 9 *M. & W.* 681., 1 *C. & Marsh.* 554.

Jan. 30. THAMES HAVEN Dock and Railway Com
HALL.

In an action for calls, after the cause had been set down for trial, and made a *remanet*, the defendant applied to set aside the proceedings, upon the ground that the company was virtually extinct, and that the parties who had inst action had no authority to do so:

Held, that the application was too late, it appearing that the defe known all the facts for a long time:

Held also, that as such parties had been for some time acting as dir court would not, upon summary application, inquire into the validit appointment; although it was provided, by the act incorporating the that at the trial it should only be necessary to prove certain matter proving the appointment of the directors.

The declaration, which was in the form given by the act, stated plaintiffs appeared by *G. S.*, their attorney; the defendant having plea

Held, that the appointment of the attorney might be presumed to seal.

The court refused to allow the defendant, at that late period, to add as to raise that question on the record.

BOMPAS Serjt. on a former day in this term 17th), applied for a rule calling upon the and Sir *George Stephen*, *James Esdaile*, and six shew cause why all proceedings in the action sh be set aside, and dwhy the said *J. E.* &c., or the *G. S.* should not pay to the defendant the cos action and the costs of the application.

The affidavits upon which the application was stated, that by virtue of the act 6 & 7 *W.* 4. *c.* cvii

(*a*) See the principal sections of the act set out, *antè*, Vol. IV. p. 552. in the notes to *The Thames Haven Dock and Railway Company* v. *Rose*. In addition to those there set out, the following were referred to in the affidavits in the principal case.

Section 94. enacts that the first general meeting of the company shall be held within six months after the the act; and that, first general meeting, be a half-yearly gen ing of the company in and in *August* in each year.

Section 95. enacts special general meeti proprietors of the com be called at any tin directors for the time

tituled "An act for making a railway from *Romford* in the county of *Essex*, to *Shell Haven* in the same county, and for constructing a tide dock at the termination of

any five of them, if they shall see occasion; and any twenty or more proprietors of the said company holding in the aggregate 500 shares or upwards in the said undertaking, upon which all calls actually previously made shall have been paid and satisfied, may at any time, by writing under their hands, left at the office of the said company, require the directors of the said company to call a special general meeting of the proprietors of the said company to be held in *London*, so as such requisition fully express the object for which such special general meeting is required to be called; and the said directors are thereupon required to call such meeting accordingly, and in case of neglect or refusal of the said directors to call such meeting for the space of fourteen days next after such requisition given or left as aforesaid, the same may be called by such twenty or more proprietors by giving fourteen days notice thereof by advertisement in two or more *London* newspapers, and in one or more newspaper or newspapers usually circulating within the county of *Essex*, such notice expressing the object for which such special general meeting is required to be called; and the said company are hereby authorised to meet in pursuance of such notice, and such of the proprietors thereof as shall be present at such meeting shall proceed to the execution of the powers by this act given to the said company with respect to the matters so specified in such notice; and all acts and resolutions of the major part in votes of the proprietors of the said company met together at any such special general meeting shall be as valid and binding, with respect to the matters specified in such notice, as if the same had been done or resolved at a general meeting held at the time hereinbefore appointed for holding the same."

Sect. 98. enacts, "that, if at any such general meeting there shall not be twenty proprietors present who shall be holders of at least 500 shares in the aggregate, within two hours from the time appointed for such meeting, no choice of directors shall be made, nor shall any business be done, but in such case there shall be another meeting of the said company at the same place, and at the same hour at the expiration of seven days then next; and if at such adjourned meeting such sufficient number of proprietors shall not attend within the time last aforesaid, the directors for the time being shall continue to act and have the same powers as they had and were possessed of until the next general half-yearly meeting, or until new directors shall be appointed."

Sect. 124. enacts "that in any action to be brought by the said company against any proprietor of any share in the said

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the said railway at *Shell Haven* aforesaid," therein mentioned became incorporated by The Thames Haven Dock and Railway Com

undertaking, to recover any money due and payable to the said company for or by reason of any call made by virtue of this act, it shall be sufficient for the said company to declare and allege that the defendant, being a proprietor of so many shares in the said undertaking, is indebted to the said company in such sum of money as the calls in arrear shall amount to, for so many calls of such sums of money upon so many shares belonging to the said defendant, whereby an action hath accrued to the said company by virtue of this act, without setting forth the special matters; and on the trial of such action it shall only be necessary to prove that the defendant at the time of making such respective calls was a proprietor of such shares in the undertaking as such action is brought in respect of, and that such calls were in fact made, and that notice thereof was given as is directed by this act, without proving the appointment of the directors who made such call or any other matter whatsoever; and the said company shall thereupon be entitled to recover what shall appear due, including interest, computed as aforesaid, in respect of such calls, unless it shall appear that any such call exceeded 5*l.* for every share of 50*l.* or was made within the space of three calendar months from the last preceding call, or that calls amounting to more than 20*l.* in the v made in some o in order to prov ant was a prop shares in the sai as alleged, the the book in whi tary of the said this act directed keep a list of t additions, and p of the several shares in the sai with the number are respectively e shall be *primâ* that such defend prietor, and of t amount of his sh

Sect. 246. ena director of the sa be appointed und rity of this act s or means, or on being party to, signing or exec capacity of direct pany, pursuant t contract or other or on behalf of pany, or other executing any o and authorities said directors by subject or liable prosecuted or im individually or c any person whom court of law or e where, and tha goods, chattels, l ments of the sai any of them, shal son, on account, quence of any su

affidavits then, after referring to sections 108. (*a*) 94. (*b*), and 109. (*c*), stated that within six months after the passing of the act, viz.: on the 28th of *September* 1836, the first general meeting of the company was held, when the first directors went out of office, and twelve persons were elected in their stead; that on the 21st of *February* 1837, the first half-yearly meeting of the company was held, when the directors reported that in the state of the finances of the company, they would not have been justified in commencing the intended works; that on the 28th of *August* 1837, the second half-yearly meeting was held, when the directors reported that they had been prevented commencing the intended works; and that they also felt that the shares were in too few hands to enable them to anticipate success to the undertaking, and it was then unanimously resolved that the affairs of the said company should be wound up, and the company dissolved as to all such parties as were desirous to retire; and the directors then stated that they would feel it their duty to carry such resolution into effect in such a way as should withdraw all responsibility as to the future from those who might be disposed to retire; that the defendant testified his wish to retire, and at the secretary's request forwarded to him his certificates of

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other instrument so entered into, or made, signed or executed by them or any of them as aforesaid, or any other lawful act which shall be done by them or any of them in the execution of any of the powers and authorities given to them or any of them by this act, be liable to be arrested, seized, detained, or taken in execution, but that in every such case any person making any claim or demand upon the said company or upon any directors thereof, under or by virtue of any contract or instrument, or other lawful act, may sue and implead the said company in like manner as if such contract, instrument, or other act had been entered into and executed, and done under the common seal of the said company."

(*a*) *Antè*, Vol. IV. p. 552. n.

(*b*) *Suprà*, p. 274.

(*c*) *Antè*, Vol. IV. p. 553. n.

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shares with a consent to relinquish the same; that the chairman of the company and other directors did also thereupon withdraw from the company, together with the solicitors of the company and a numerous body of proprietors; that, in the belief of the defendant, from the period of such retirement, no legal body of directors duly qualified and elected pursuant to the provisions of the act, had since been constituted, and that no legal or competent authority had since become substituted in any person or persons, for exercising or assuming the powers or authorities conferred by the act, for managing, directing, superintending, and controlling the business and concerns of the company; and that the present action had been brought, and that the style of the company had been adopted and used for that purpose without any sufficient authority, and in direct violation of the true intent and meaning of the act, and particularly of the 108th and 109th sections (*a*); nevertheless the defendant admitted that, after the partial dissolution of the company which took place in 1837, by the withdrawal of the chairman &c., as before mentioned, one *H. A.* the secretary of the company, together with certain individuals interested as land owners and otherwise in respect of the land, for the proposed docks and railway, did attempt to prevent the total dissolution of the company, and with that view the following proceedings took place; on the 13th of *March* 1838, a meeting was held, purporting to be a half-yearly meeting of the company, but which meeting, in the belief of the defendant, did not consist of twenty proprietors then present, holding 500 shares in the aggregate; that at such meeting no election of directors took place in conformity with the express provision of the 109th section (*a*); but instead thereof the following resolution was passed,

(*a*) *Antè*, Vol. IV. p. 553. n.

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"that the vacancies in the direction be left to be filled at the discretion of the directors themselves, who have so fully proved their interest and care of the company's affairs;" that other meetings, purporting to be half-yearly meetings, but none of which consisted of twenty proprietors as before mentioned, were held on the 29th of *August* 1838, and the 27th of *February*, and the 29th of *August* 1839; that, in the defendant's belief, no half-yearly meeting was either advertised or held in *February* 1840, and that, with reference to such omission, the then solicitors of the company addressed, in *May* 1840, to one *T. P.* who then acted as a director of the company, a letter from which the following was an extract; "Understanding that some of the gentlemen who are, or at all events lately were, directors of *The Thames Haven* Company were to meet together last *February*, we thought it due to them personally to be in attendance. We pointed out to the gentlemen present the great doubts, to say the least, whether they now had any authority whatever, since the failure to hold the general half-yearly meeting in *February* last, when three of them ought to have gone out by rotation. It occurs to us that nothing can now be legally done, unless by virtue of the powers given to a special general meeting by the ninety-fifth clause (*a*); and even in convening such meeting there may be technical difficulties, though perhaps not sufficient to invalidate the acts of the proprietors present. At present it appears to us, the creditors of the company have no remedy against the company, there being no secretary, no office, no assets, and no person existing to create assets by a call;" that on the 29th of *August* 1840, another half-yearly meeting was held, which separated without any thing being done; that the said *H. A.* caused an advertisement to be inserted in

(*a*) *Suprà*, p. 274. n.

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the *Post Magazine*, on the 28th of *November* 1840, in which he represented that the directors of the said company consisted of five persons resident in *London*, and seven persons resident in *Manchester* (the five first mentioned directors being *J. Esdaile* and some of the other parties against whom the rule was moved;) and the said *H. A.* in the said advertisement stated as follows:— "some influential gentlemen in *London* have consented to supply the places of the *Manchester* directors, who have expressed their willingness to retire. The names of the new directors are necessarily omitted, till they are actually appointed in the form required by the act;" — that, in the belief of the defendant, no such appointment had since been made, either in the form required by the act, or in any other form; that the five *London* residents before mentioned had up to that time continued to act as directors; and that the only addition that had been made to their number was, that two persons (being two more of the parties against whom the rule was moved), had for about two years past been associated with them; that on the 25th of *February* 1840, another half-yearly meeting was held, which was adjourned to the 4th of *March* following, when it was again adjourned; it having been found impracticable, in the belief of defendant, to procure on either of those occasions the attendance of the proprietors, except that of the official parties or those who assumed to be such; that the said *H. A.* afterwards issued a prospectus of the company, dated *May* 1841, in which the names of the directors (*J. Esdaile* and the six others) were set forth; that another half-yearly meeting was held in *August* 1841, when no business was transacted; that on the 23d of *February* 1842, another half-yearly meeting was held, when the chairman, *J. Esdaile*, stated that, although the legal number of proprietors was not present, he thought it desirable to proceed to business, and accordingly, in defiance of

sect. 98. (*a*), the meeting passed various resolutions, and the said *H. A.* read a report in which it was stated that *J. Esdaile* and two of the other parties would go out of the direction by rotation; but that being re-eligible would offer themselves for re-election, and they were accordingly re-elected, and had continued to that time to act as three of the seven persons constituting the direction; that a half-yearly meeting was advertised for the 31st of *August* 1842, but no such meeting was held, the office being closed; that the report read at the meeting of the 23d of *February* 1842, contained a statement of the receipts and expenditure of the company, from which it appeared that the receipts from *September* 1835, to *December* 1841, amounted to 26,213*l.* 2*s.* 6*d.*; that, with the exception of a small balance in hand, the company had expended the whole amount received, and, for the greater part in a useless manner, such as salaries, &c., &c.; that the further liabilities of the company were stated to amount to 8000*l.* for outstanding bills, &c.; that, in the belief of the defendant, the proposed works for which the act was passed had never been commenced, and there was no probability of their being commenced, the company being altogether destitute of the necessary means, and their powers for compulsory purchases of land having long since expired; that the attorney for the plaintiffs, in bringing this and other similar actions, was Sir *George Stephen*; that on the 18th of *May* last, and while this and other similar actions were pending, the said Sir *G. S.*, as attorney for the said *H. A.*, convened a meeting of the creditors of the said *H. A.*; that the defendant had been informed that the said Sir *G. S.* proposed that the creditors should give to the said *H. A.* a twelve-month's time for the payment of his debts, and represented to such creditors, that if they would accede

(*a*) *Suprà*, p. 275. n.

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to such proposal, the said *H. A.* would be enabled t satisfy his debts out of the proceeds of the action brought at the suit of the company for recovery of calls that the present was the third action brought agains the defendant at the suit of the plaintiffs for calls; tha in the first, which was brought in 1839, the plaintiff withdrew the record; that in the second they were agai defeated; and that, although the defendant might obtai a verdict in the present action, he had no remedy fo recovery of his costs, the company being, as far as th defendant was aware, without any property that coul be taken in execution, and, by sect. 246 (*a*) of the act the directors themselves are exempted both in perso and property, from all liabilities for payment of suc costs; that the defendant having, in *December* 1841, re ceived a letter from the said Sir *G. S.* demanding pay ment of certain moneys alleged to be due from the de fendant to the plaintiffs, the defendant wrote to th said Sir *G. S.*, stating that he had no shares on whic any demand could arise, and that when in 1839 th company made a similar demand, he resisted it, an obtained judgment in his favour and a written promis from their solicitors, that no further proceedings shoul take place against him, and if that were not satisfa tory, he requested to be furnished with the names of th directors in order to bring the matter before them; th no reply was made to that letter; that the defenda was afterwards served with a copy of a writ at the su of the plaintiffs, issued by Sir *G. S.* as their attorney that the defendant made a second application for th names of the directors to the agent of Sir *G. S.*; th all information on the subject was refused; and that th defendant did not then know the names of the director but had since ascertained them. Other facts were then s

(*a*) *Suprà*, p. 276. n.

forth to connect Sir *G. S.* with the company, and to shew that statements contained in the prospectuses issued by the company from time to time, were devoid of truth, and that, by reason of the existing difficulties, Sir *G. S.* had given notice in the *London Gazette* of an intention on the part of the company to apply to parliament for a bill, to authorise the abandonment of the said line of railway, and the substitution of a different line in lieu thereof.

The learned serjeant urged that as the company was virtually extinct, there was nobody who could legally authorise the attorney to proceed for calls, and that the action was for the benefit of the secretary alone. The court having, therefore, though reluctantly, granted the rule,

Talfourd and *Channell* Serjts. (with whom was *Carey*) now shewed cause upon affidavits of *H. A.* the secretary, of *J. Esdaile* and the other persons mentioned in the rule, and of the clerk to Sir *George Stephen*. These affidavits, besides containing a denial of the principal allegations in the affidavits upon which the rule had been obtained and a history of the proceedings of the company, stated that the calls in respect of which the action was brought, had been made, and the proceedings in the present action had been taken, by the direction and with the consent of the seven directors mentioned in the rule, who had been duly elected according to the provisions of the act. It also stated that the writ of summons in the action was issued on the 6th of *December* 1841, which was served, but the writ and service were afterwards set aside for irregularity; that on the 15th of the same month a fresh writ of summons was issued and duly served; that issue was joined in the cause on the 12th of *May* 1842, and notice for trial

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given for the adjourned sittings after the then next *Trinity* term; that on the 21st of *June* 1842 the record was passed, and the cause was entered for trial, and was appointed to be tried on the 19th of *December* then next; that the cause was afterwards, owing to pressure of business, made a *remanet* by consent; that the defendant had pleaded the following pleas. (*a*) — first, never indebted; secondly, that defendant was not a proprietor; thirdly, that before the calls in the declaration mentioned were made and became due, at a meeting of the said company duly convened for that purpose, it was resolved and agreed that such of the proprietors as elected so to do, and gave due notice thereof to the company, should be at liberty to relinquish their shares and quit the company, and upon their so doing should receive back their quota upon the amount paid per share out of the funds of the said company then remaining in hand, after payment of expenses; that the defendant elected to quit the said company accordingly, and gave due notice of his intention so to do; and that the defendant had from thence hitherto always been ready and willing to quit the company, and to execute all acts necessary for that purpose, of which the said company had notice; but the company refused to allow him so to do, and hindered and prevented him from so doing; — fourthly, that the said company was fraudulent and illegal, and a common nuisance, and not in any way a *bonâ fide* undertaking. It was also stated that an act for extending and enlarging some of the provisions of the former act, received the royal assent on the 30th of *June* 1842, by which, after reciting the former act, it was enacted that the said recited act, and

(*a*) The record was referred to by the court; and it appeared that the declaration was in debt for calls, in the form given by the act (sect. 124.), it being stated that the company appeared by Sir *G. S.*, their attorney.

all the provisions, matters, and things therein contained, except so far as the same were varied or repealed, should extend to the latter act in as full a manner as if they had been re-enacted in the latter act, with reference to the objects and purposes thereof. And that at the time the latter act was passed, and for more than a year before, there were only seven directors of the company.

They contended that the application was unfounded and unprecedented; that this court having already decided in *The Thames Haven Dock and Railway Company* v. *Rose* (*a*), that the clauses in the act under which the company was incorporated, were only directory as to the number and election of directors, would not now decide upon motion that the company had no legal existence, or usurp the functions of a court of equity, and issue a perpetual injunction to restrain the company from suing any party for calls. [*Erskine* J. The rule was granted upon the ground that the attorney who brought the action was not authorised by the company in so doing, and that it was brought not for the legitimate purposes of the company, but for the private benefit of the secretary.] These suggestions are distinctly disproved by the affidavits in answer. [*Tindal* C. J. We certainly cannot try upon affidavit matter of fact which the plaintiffs have a right to submit to the consideration of a jury. When the rule *nisi* was granted, we did not know that the cause was ripe for trial; and it would not have been granted but for the suggestion that the action was brought without proper authority.]

Bompas Serjt. (with whom was *Petersdorff*) in support of the rule. The court will interfere in any case

(*a*) *Antè*, Vol. IV. p. 552., 5 *Scott, N. R.* 524., 2 *Dowl. N. S.* 1004.

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to prevent fraud; and will set aside proceedings that have been instituted by an attorney without authority; *Doe dem. Hammek and Corporation of Plymouth* v. *Fillis.* (*a*) [*Cresswell* J. The defendant has called upon the plaintiffs and their attorney to shew cause why the proceedings in the action should be set aside. What cause can they shew further than they have done? It appears distinctly from their affidavits, that the proceedings were taken by the authority of the seven directors.] It is submitted that these parties had no power to give any such authority. The shareholders are not to be at the mercy of any individual who chooses to sue them in the name of the company. The parties in question were not directors, the company being virtually extinct. [*Tindal* C. J. How can that be, when there was an act passed last year which recognised the company?] The act does not authorise the renewal of the company. [*Tindal* C. J. It must apply to the existing company.] Then there is clearly no authority to the attorney to bring the action under the seal of the company (*b*); and if there had been no valid authority, the proper course to adopt was, to apply to the court to set aside the proceedings. [*Tindal* C. J. It nowhere appears that the appointment was not under seal.] The defendant says that the attorney was not appointed at all; it is for the attorney to shew that the appointment, if it existed, was a good one. [*Maule* J. It is quite consistent with the defendant's affidavits, that the attorney was appointed under the seal of the seven persons who, according to the defendant's statement, are not directors. *Tindal* C. J. This point as to the seal was not mentioned when the rule was moved for.] It is submitted that the attorney is bound to shew a valid appointment in all respects. The defendant is pre-

(*a*) 2 *Chitt. Rep.* 170.

(*b*) See *Arnold* v. *The Mayor of Poole, antè*, Vol. IV. p. 860., 5 *Scott, N. R.* 741.; *The Fishmongers' Company* v. *Robertson, suprà*, p. 131.

nted by the 124th section (*a*) from raising the objection her upon the record, or before the jury.

Tindal C. J. It appears to me that the present application fails upon two grounds. In the first place it is so stale. I cannot understand why the defendant should le by till the cause is ready for trial, — and would indeed have been tried before now, but for an accident, — and then come with the present application. It clearly appears from the affidavits, that he was aware of all the circumstances long ago, and he ought to have made his application immediately upon the facts coming to his knowledge. And this applies with greater force to the objection as to the want of an appointment of the attorney under seal. That objection should certainly have been brought to the notice of the parties when the rule was applied for. But upon this point it seems sufficient to say, that for ought that appears, there may have been a proper authority under seal; and unless something is disclosed to shew there was no seal, I think we have a right to assume that there was one.

But independently of that, I am of opinion that the defendant is substantially answered upon the merits. I agree that if seven persons unconnected with the company, had authorised an attorney to bring an action in the name of the company, it would have been very improper, and the court would undoubtedly have interfered. But the parties who have given the authority in this case have, at least, acted as directors. There are many nice points under the act as to the election of directors; and many of the enactments upon that subject are clearly directory only. And if the shareholders allow parties to act in the capacity of directors, it may be they have no right to turn round in a court of justice and say, that such parties were not

(*a*) *Suprà*, p. 275. n

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properly elected. But I give no opinion upon that either one way or the other, as the application is sufficiently answered upon the other ground. I think therefore, that this case, which is virtually an application founded upon the alleged misconduct of an attorney — calling upon him to pay costs — is not one in which we ought to interfere, and that if we did so, it would be taking away from the company their right to submit their case to a jury.

ERSKINE J. I am of the same opinion. Where has happened that an attorney has instituted proceedings, and used the names of parties, without authority the court, upon application, has set such proceedings aside; but the application has been with the sanction of both the plaintiff and defendant. In the present case when the rule was moved for, it was said that the action was brought in the name of the directors of the company; that there were no persons competent to act in that character, and consequently the action was brought without the authority of the company, and that the attorney who had issued the process, was the attorney to a party who had formerly acted as secretary to the company, the object of the action being merely to raise money for the purpose of paying the arrears of his salary. Certain parties, who it appears have been, and still are, acting as directors of the company were called upon to shew cause against the rule, and they appear for that purpose by the attorney, whom they say they authorised to bring the action in question. We have therefore the fact of the action being brought with the authority of seven persons who are acting as directors; and can we, on a summary application of this nature, institute an inquiry whether they were properly appointed? It is assumed, on behalf of the defendant, that by the 124th section of the first act, the

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question as to the validity of their appointment cannot be raised, either upon the record or at the trial. Now that section either goes to exclude the question being raised by the defendant, or it does not. I think that it does not; but if it does,—the legislature having thought that a shareholder should not dispute the authority of the directors before a jury, — why should he have power to do so before the court? The defendant ought to have taken care that the company were in a condition to carry on the business.

MAULE J. I am of the same opinion. This is a motion to set aside the proceedings in an action, upon the ground that the action was not authorised by the company, who are the plaintiffs on the record; and the further point is now taken, that the attorney, by whom the action is brought, was not appointed under seal. But it appears on the record that the action is brought by an attorney, and his authority, in that respect, not being denied by the plea, must be taken to be admitted. Then the parties acting as directors are called upon to appear and shew cause against this rule. They have appeared by their attorney, and do not repudiate, but expressly adopt, the action. This is a sufficient answer to this application. It is conclusive that they are the plaintiffs, and have authorised the action.

The defendant, a shareholder in the company, seeks to institute an inquiry into their internal affairs; which perhaps it would not be open to him to do at the trial; for it is not competent to a defendant in an action for calls, to insist as a defence that every minute direction of the act has not been complied with. But independently of that, I think this rule must be discharged for this short reason,—that it was obtained on the ground that the action was not authorised by the company, and the company now come and say it was authorised by them.

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CRESSWELL J. I am entirely of the same opinion. If the defendant is not a shareholder in the company, no danger or difficulty is imposed upon him, as there is an end of the claim against him, whether the action is brought by the directors or not. If he is a shareholder, he ought at least to have come sooner with his application, as he should have known the state of the company. But it is argued that he may come now and call upon the court to inquire into the authority of the directors, because the legislature have, by the 124th section of the act, shut him out from any inquiry at another period, or in another manner, by preventing him from *pleading* that the calls were not duly made, or that the directors were not duly appointed. But I agree that if he is precluded from raising this question before the jury or upon the record, that is no reason why he should do so in this summary way.

The rule was obtained upon a suggestion that the company were not suing. It appears clearly however that they are suing — that the seven parties who have for some time been acting as directors, have sanctioned the proceedings in the present action — and these parties being called upon appear to the rule expressly say that the action was brought by their direction.

Rule discharged with costs.

Bompas Serjt. afterwards applied for leave to plead the matters stated in the defendant's affidavits so as to raise the question on the record; but the court refused the application after there had been so full a discussion, as the facts must all have been known to the defendant at the time he pleaded; that the real merits in the case were, whether or not the defendant was a shareholder in an existing company.

The learned serjeant therefore

Took nothing.

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DOWLING Serjt., on a former day in this term (16th of *January*), obtained a rule nisi to set aside distringas, upon the joint affidavit of two illiterate persons (*a*), the jurat of which was as follows: —

The *jurat* of a joint affidavit must shew that the deponents were severally sworn.

"Sworn, at *Clare*, in the county of *Suffolk*, the 23d day of *January* 1843, being read over to, and fully understood by, the said *Joseph Price* and *Anna Maria Price*,

"Before me,

"*G. P. Arden*,

"A commissioner, &c."

Talfourd Serjt. now shewed cause. After reading and commenting upon the affidavits, he raised an objection to the form of the jurat, as not being conformable to the *R. M.* 37 *G.* 3. *r.* 1. (*b*) It should have stated, that the parties were *severally* sworn, the affidavit being read over to them &c.

Dowling Serjt., who was to have supported the rule, was called upon by the court. The jurat is substan-

(*a*) See *R. E.* 31 *G.* 3. 4 *T. R.* 284., 8 *Price*, 501.

(*b*) "It is ordered, that from and after the first day of next term, upon every affidavit sworn in this court, or before any judge or commissioner thereof, and made by two or more deponents, the names of the several persons making such affidavit shall be written in the jurat; and that no affidavit be read or made use of in any matter depending in this court, in the jurat of which there shall be any interlineation or erasure." This was a rule of the court of K. B. A similar rule was made in the Exchequer *T.* 1 *G.* 4. 8 *Price*, 501. And it is stated in 3 *M.* & *P.* 559. (*Houlden* v. *Fasson*), that the same practice, though not prescribed by rule, obtains in this court.

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tially in compliance with the rule of court.] from the body of the affidavit that it was joi stated that the parties "severally made oath &c. [*Maule* J. But it does not appear from that the affidavit was severally sworn. "Swc not mean sworn by both. As it stands, it m one of them did not swear it, and it is imp say which.] The objection at all events is late; it has been waived by the fact of the having gone into the merits. [*Tindal* C. J. haps an objection that the court are bound to

Per curiam;

Rule discl

(a) In *Lackington* v. *Atherton*, *Bompas* had obtained, in the same term, a rule nisi for judgment as in case of a nonsuit upon a joint affidavit, the jurat being in this form: — "Sworn in court in *Westminster Hall*, this 24th day of *January* 1843, before me, *C. Cresswell.*"

Channell Serjt. t objection as was t principal case, and *den* v. *Fasson*, 6 1 3 *M. & P.* 559., *su* but he accepted a undertaking.

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THOMAS ROGERS *v.* JOHN PETER HOL

The court refused to discharge a judge's order (made under the 1 & 2 *Vict. c.* 110. *s.* 14.) to charge stock standing in the names of trustees for the defendant.

BY a deed of settlement, dated the 26t 1839, and made pursuant to an or court of Chancery, dated the 22d of *March* tween *John Peter Holloway*, of the first pa *Holloway* (his wife), of the second part, an

The stock had been transferred into the names of the trustees settlement made pursuant to an order of the court of Chancery. ther a court of common law had jurisdiction to interfere in the matt

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Dale, *Philip James Chabot*, and *Richard Lake*, of the third part, two sums of 1397*l.* 2*s.* 1*d.* bank three per cent. consolidated annuities, and 4489*l.* 10*s.* 9*d.* reduced three per cent. annuities, and the dividends, interest, or annual produce thereof, were transferred into the names of the said *C. D.*, *P. J. C.*, and *R. L.*, upon trust to pay the dividends and annual produce of the said trust, stocks, or funds and premises thenceforth to arise, or become payable thereon, unto the said *J. P. Holloway*, "until the said *J. P. H.* should become bankrupt or insolvent, or should assign, alien, incumber or dispose of the said dividends, and annual produce or any part thereof; and upon trust, that in case the said *J. P. H.* should make any assignment, alienation, incumbrance or other disposition of or affecting the dividends and annual produce of the said trust funds and premises, or any part thereof, or in case a fiat in bankruptcy or a commission of bankrupt, should be issued against him, under which he should be declared a bankrupt, or in case he should take the benefit of any act for the relief of insolvent debtors, then, and in any or either of the aforesaid cases, and in case the said *H. H.* should be then living, and in the event of the death of the said *J. P. H.* leaving the said *H. H.* him surviving, upon trust to pay the dividends or annual produce of the said stock or funds, and premises, from time to time when and as the same should become due and be received into the proper hands of the said *H. H.*, for and during her natural life, for her own separate use and benefit, free from the control, debts and engagements of the said *J. P. H.*, and that her receipts should be good discharges for the same" &c.; with a similar trust for the children in case the husband should survive the wife.

On the 7th of *September* 1841 the defendant, *J. P. H.*, being then in custody, the following order was

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made in this cause by *Wightman* J. (*a*), on th tion of the plaintiff: —

(*a*) Under the provisions of 1 & 2 *Vict. c.* 110.

S. 14. enacts "that if any person against whom any judgment shall have been entered up in any of Her Majesty's superior courts at *Westminster* shall have any government stock, funds or annuities, or any stock or shares of or in any public company in *England* (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock &c., or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order."

S. 15. "In order to prevent any person against whom judgment shall have been obtained from transferring, receiving or disposing of any stock, funds, annuities or shares hereby authorised to be charged for the benefit of the judgment creditor under the order of a judge, be it furth that every order charging any goverı funds, or annuiti stock or shares in company, under th be made in the fi *ex parte*, and with tice to the judgm and shall be an or cause only; and su any government sto annuities standing of the judgment d own right, or in t any person in trust to be affected by shall restrain the g company of the Ba *land* from permittin of such stock in the and until such or made absolute or and if any stock or in any public com ing in the name o ment debtor in his or in the name of in trust for him, i be affected by any shall in like mani such public compan mitting a transfer th that if, after noti order to the persor to be restrained the case of corporatio authorised agent o poration, and befor order shall be dis made absolute, such or person or persor mit any such tra made, then and in the corporation or persons so permi

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"*Thomas Rogers* v. *John Peter Holloway.* } Upon reading the affidavit &c., and upon hearing the attorneys for the plaintiff and the defendant, and the trustees after-named, I do order that the sum of 4489*l.* 10*s.* 9*d.* reduced three per cent. annuities, and also the dividends, interest or annual produce thereof standing in the names of *Clement Dale*, *Philip James Chabot*, and *Richard Lake*, and the sum of 1397*l.* 2*s.* 1*d.* consolidated three per cent. annuities, interest, and annual produce thereof, standing in the names of the said *C. D.*, the said *P. J. C.*, and the said *R. L.*, shall stand charged with the payment of the sum of 297*l.* 17*s.*, damages and costs in this action, with interest thereon, at the rate of four pounds per cent. per annum, from the 13th of *May* 1841, on which day judgment was entered up."

This order was duly lodged at the Bank of *England*.

On the 13th of *August* 1842 *J. P. H.* obtained his discharge under the insolvent debtors' act, the debt mentioned in the above order being inserted in his schedule. The trustees afterwards applied to *Cresswell* J., to rescind the above-mentioned order, on the ground that the defendant had taken the benefit of the insolvent debtors' act. His lordship, however, after taking time to consider, declined to interfere.

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transfer shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor in the mean time shall be valid or effectual as against the judgment creditor; and further, that, unless the judgment debtor shall within a time to be mentioned in such order show to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: Provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit."

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Sir *T. Wilde* Serjt. in last *Michaelmas* term (22d *November*) applied for a rule calling upon the plaintiff to shew cause why the said order should not be discharged — either unconditionally, or — on payment by the trustees, under the settlement of the 26th of *July* 1839, to the plaintiff or his attorney, of the amount of the charge which the court should adjudge the plaintiff to be entitled to under the said order.

The affidavit upon which he moved detailed the above facts, and also stated that *H. H.* was still living, and that since the adjudication application had been made at the bank, on behalf of the trustees of the settlement, for payment of the dividends due in respect of the said sums, which was refused in consequence of the order of *Wightman* J.

[*Maule* J. If the stock is improperly charged, is not the court of Chancery the proper tribunal in which to seek for a remedy? The act does not give any appeal from the judge's order to the common law courts.] In terms it does not give any jurisdiction to make an order charging the stock to the court in which the judgment is obtained, and it would seem that such court has no power to make such an order; *Brown* v. *Bamford* (*a*) but the judge's order, which is made in an action in this court, must be subject to the revision of this court in the same manner as any other order. If the court declines to review the judge's order the parties must be driven to the tardy and expensive remedy of a suit in equity in order to obtain the payment of the dividends to Mr. *Holloway*. [*Maule* J. How does the order affect the payment of the dividends?] It charges the dividends incidentally; though, in terms, it only applies to the stock. [*Maule* J. There may be this difficulty that although, where an order is made, the court of Chancery may be the proper tribunal to review it,

(*a*) 9 *M. & W.* 42., 1 *Dowl. N. S.* 361.

where an order is refused there might be no appeal, unless there is one to the court in which the judgment was obtained. *Erskine* J. By the sixth section of the act an appeal is expressly given to the court in the case of a judge's order made under sect. 3.]

The court granted a rule nisi in the terms prayed, against which

Shee Serjt. now shewed cause, upon an affidavit stating that the said deed of settlement, although made and executed with the approbation and under the sanction and order of the court of Chancery, in a suit depending in that court, yet such suit was a friendly suit, to which the plaintiff as one of the creditors of the defendant at that time was no party, nor were any other of the then existing creditors of the defendant parties thereto; that the defendant was indebted to several creditors in large sums at the time of the said deed of settlement being so prepared and executed, and that, amongst other creditors, the defendant was at that time indebted to the plaintiff in the amount of the debt for which this action was commenced; that such deed of settlement was made and executed without any valuable consideration paid or given to the defendant, or any consideration sufficient to sustain the same against the defendant's creditors generally, and that the same was made and executed with a view by the defendant and *H. H.* his wife respectively to defraud and hinder and delay the plaintiff, and other the creditors of the defendant, in their just and lawful debts; that the plaintiff had filed his bill in the court of Chancery against the defendant and *Harriot* his wife, the said *C. D.*, *P. J. C.*, and *R. L.*, and *Samuel Sturgess*, provisional assignee of the estate and effects of the defendant, praying that, notwithstanding such deed of settlement above mentioned, the plaintiff might be paid and satisfied the

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said judgment debt of 297*l.* 17*s.*, and also the interest due in respect thereof, mentioned in the order of the 7th of *September* 1841, or which had since accrued and arisen, or might thereafter accrue or arise from or in respect of the said sum of 4489*l.* 10*s.* 9*d.* reduced annuities, and 1397*l.* 2*s.* 1*d.* consolidated annuities; and that *subpœnas* to appear had been obtained on the part of the plaintiff in the said suit in Chancery, calling on the defendants to appear and answer the said bill, and that such *subpœnas* had been duly served.

The learned serjeant observed, that although nothing was said in the act as to the revision of the judge's order by the court, he would not dispute their general jurisdiction, in a case where the parties had come quickly; but they had not done so in this case; and therefore the question could not be entertained. And further as to that part of the rule by which it was sought to limit the operation of the learned judge's order, it would open the whole question as to the validity of the settlement, for which this court was not the proper tribunal.

Bompas Serjt. in support of the rule. Under the fourteenth section the judge could only charge the interest of the judgment debtor under the settlement; in the same manner as if the judgment debtor were a tenant for life with remainder over, the sheriff could only take his life interest in execution under the thirteenth section. [*Tindal* C. J. That section expressly provides that "every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall been entered up had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same with the amount of such judgment debt and interest there-

on." *Maule* J. And the fourteenth section enacts that "such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor."] The order in this case charges the stock generally. [*Maule* J. Only to the same extent that the debtor could charge it; and he could not charge it otherwise than by giving the creditor a remedy in a court of equity.] The order is not limited to the debtor's interest, but charges the stock generally, in terms. [*Tindal* C. J. But not in effect.] It was intended to give the judgment creditor the same power over the stock as over the real estate of the debtor. [*Erskine* J. It does not appear that the bank has any power to transfer the stock.] There is no stock at present standing in the name of *John Peter Holloway*. [*Tindal* C. J. Then you are not hurt.] Mrs. *Holloway* will not be able to get her dividends, as the property is bound by the order.

TINDAL C. J. If we entered into the matter, it appears we should have to settle a complicated question of equity; and that we cannot do. (*a*)

Per curiam;

Rule discharged.

(*a*) *Vide Tucker, in re, antè,* Vol. I. p. 519. Vol. IV. p. 1079. *Tucker* v. *Inman, antè,* Vol. IV. p. 1049. 1078. n.

Jan. 20. ALEXANDER *v.* TOWNLEY.

A plea (in assumpsit) setting out three commissions of bankrupt against the plaintiff, one fiat and two discharges under insolvent debtors' acts, and alleging that the plaintiff's estate did not on any occasion produce 15*s.* in the pound, is bad for duplicity.

The court permitted the defendant to amend on payment of costs, but refused to allow him to plead the various bankruptcies, &c. in several pleas.

ASSUMPSIT upon four bills of exchange the plaintiff, payable to his own order an by the defendant. The declaration also co count upon an account stated.

Plea: that before the accruing of the seve of action, to wit, on the 30th of *October* 1809, thence continually until the suing out of mission of bankrupt thereinafter mentioned, th was a broker and a trader within, and acco subject to, the laws and statutes then in force ing bankrupts, and during all that time did ex trade of a broker, and sought his living by b selling; and the plaintiff so exercising the s and being such trader, and seeking his living said, on the day and year aforesaid, became indebted to one *Aaron Norton* in 100*l.* and and was also indebted to other persons in o sums of money, and the plaintiff being so inde so exercising the said trade, and being such t seeking his living as aforesaid, afterwards, t &c., the said debt to *Norton* and the said ot being then unpaid, became and was a bankru the true intent and meaning of the several sta laws then in force concerning bankrupts; a upon, afterwards, to wit, on &c., a commission of under the great seal, bearing date &c., groun the petition of *Norton*, was duly awarded ar against the plaintiff, directed &c., by which co &c., by virtue of which commission, and by for statutes, the major part of the commissioners

the said commission having severally and respectively duly taken the oath &c., afterwards, on the 25th of *November*, in the year aforesaid, did, in due form of law, find that the plaintiff had become a bankrupt within the true intent and meaning of the said statutes, before the date and issuing forth of the said commission, and did then declare and adjudge him to be a bankrupt accordingly; that on the said 25th of *November*, in the year last aforesaid, due notice was given and published &c., and that he had been declared and adjudged a bankrupt thereon, and required to surrender himself; that the several meetings were duly appointed for the plaintiff to surrender himself &c.: and the plaintiff duly surrendered himself to the major part of the said commissioners, and submitted himself &c.; and at the last of the said meetings, to wit, on the 6th of *January* 1810, finished his examination upon oath before the major part of the said commissioners; and the plaintiff afterwards, to wit, on the 5th of *December* 1810, duly obtained his certificate of conformity under the said commission, which certificate afterwards, to wit, on the day and year last aforesaid, was duly allowed &c., nevertheless the estate of the plaintiff, under the said commission, did not produce, nor hath it as yet produced, sufficient to pay every creditor under the said commission 15*s.* in the pound on the amount of their several debts proved, &c.: that afterwards, and after the issuing of the said commission, and before the accruing of the several causes of action in the declaration mentioned, to wit, on the 31st of *October* 1817, the plaintiff was actually a prisoner in the custody of the marshal of &c., at the suit of one *Robert Wardell* and others, his creditors, within the meaning &c., and did, according to the directions and provisions &c., apply by petition, in a summary way, to the court for relief of insolvent debtors for his discharge from such

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custody as aforesaid, according to the provisions of the said act; which petition was duly subscribed by the plaintiff, and was forthwith afterwards, to wit, on the 17th of *November* 1817, filed in the said court, pursuant &c.; that the plaintiff did afterwards, to wit, on the 17th of *December* 1817, duly execute a conveyance and assignment to &c., then being the provisional assignee of the court, in such form as required by the statute in that case made and provided, of all the estate &c., except &c., and of all debts due or growing due (*a*) to the plaintiff; that the said court for the relief of insolvent debtors, being of opinion that the plaintiff was entitled to the benefit of the last-mentioned act, did afterwards, to wit, on &c., order and adjudge that he was so entitled, and the plaintiff was, by the said order and adjudication, ordered and adjudged, to be discharged by virtue of the said act from custody, and from the said debt of *Wardell*, and other debts and demands of the plaintiff's creditors in that order specified; and that the estate of the plaintiff, under the said discharge, assignment, or conveyance, did not produce, nor hath it as yet produced, sufficient to pay every creditor from whose debt the said plaintiff was so discharged as aforesaid, 15*s.* in the pound on the amount of that debt. The plea then set out a second bankruptcy of the plaintiff as a coach-master in 1821, and alleged that the plaintiff obtained his certificate, and that his estate did not produce 15*s.* in the pound. The plea then set out a third bankruptcy of the plaintiff, as a stable-keeper and horse-dealer, in 1831, and alleged that the plaintiff obtained his certificate, and that his estate did not produce 15*s.* in the pound. The plea then set out a fourth bankruptcy of the plaintiff, as a horse-dealer, in 1836, and alleged that thereupon afterwards, to wit, on the 19th of *December* 1836, the

(*a*) *Vide Ford* v. *Dabbs*, *post*, 309.

Right Hon. *Charles Christopher* Lord *Cottenham* then being Lord High Chancellor of *Great Britain*, upon reading the petition made to him by *White* (a creditor in 100*l.*), against the plaintiff, and *White* having made such affidavit, and given such bond as by law are required, duly made and issued his the said Chancellor's fiat in bankruptcy, under his hand, and directed to the court of Bankruptcy, and whereby the said Lord Chancellor then authorised *White* to prosecute his said complaint in the said court of Bankruptcy (*prout patet*); and that, by virtue of the said fiat, and by force of the statute in such case made and provided, *J. S. M. Fonblanque*, Esq., then being a commissioner of the said court of Bankruptcy, and appointed by virtue of the said statute, and having duly taken the oath in the presence &c., to wit, on the 20th of *December* 1836, did, in due form of law, find and adjudge that the plaintiff had become a bankrupt accordingly &c. before the issuing of the said fiat, and did thereupon adjudge and declare him to be a bankrupt accordingly (*prout patet*); that before and at the time of the making of the said adjudication one *A. B. Belcher* was, and from thence hitherto hath been, and still is one of the official assignees of the said court of Bankruptcy; that afterwards, to wit, on the said 26th of *December* 1836, the said *J. S. M. Fonblanque*, Esq., so being such commissioner as aforesaid, by writing under his hand, appointed *Belcher* to be the official assignee of the estate and effects of the plaintiff under the said fiat, to act with the assignee or assignees to be thereafter chosen by the creditors of the said bankrupt (*prout patet per* memorandum of the appointment.) The plea then alleged the publication of a notice in the *London Gazette*, the appointment of meetings, that the said *White* was chosen creditors' assignee, that the plaintiff duly surrendered, and that his estate did not produce 15*s.* in the pound. The plea

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then set out a second petition by the plaintiff to the Insolvent Debtors' Court, and his discharge from custody thereon in 1837, and that his estate did not produce 15*s.* in the pound. Averment, that the several causes of action in the declaration mentioned, and each and every of them, did accrue to the plaintiff after the several bankruptcies and insolvencies thereinbefore in that plea particularly mentioned and set forth. Verification.

Special demurrer, assigning for causes, amongst others, that the plea was double and multifarious, as it stated and relied on three several commissions of bankrupt against the plaintiff, one fiat in bankruptcy against the plaintiff, and two several petitions by him for his discharge as an insolvent debtor, under each of which his estate was alleged not to have produced sufficient to pay his creditors thereunder respectively the sum of 15*s.* in the pound, and stated and relied on the proceedings under or in consequence of the said commissions, fiat, and petitions; whereas it would have been a sufficient answer to the action if the defendant had properly shewn and had relied on any two of the said commissions and the proceedings thereupon, or any of the said commissions, and the said fiat, and the proceedings thereupon respectively, or the said fiat and any previous one of the said petitions, and the proceedings thereupon respectively — that the defendant endeavoured to embarrass the plaintiff by stating and relying on many matters unnecessarily, to wit, several commissions, one fiat, and several petitions, and the proceedings thereunder or thereupon, as some of those matters would afford a defence to the action, and the plaintiff was perplexed thereby, as, on the one hand, by the rules of pleading, he could not deny the whole of the said plea, and, on the other hand, he could not traverse or reply to a part of the said plea without admitting matters which would of themselves be an answer to his

action — that the plea did not confine the defence to some one or two of the said proceedings in bankruptcy, and in the court for relief of insolvent debtors in the said plea mentioned — that the plea was uncertain, in not shewing to which of the proceedings in the plea mentioned the defendant meant more particularly to point his defence, and did not shew in whom (or whether in any person) in lieu of the plaintiff the right to sue in respect of the causes of action declared or was vested — that the plea was ambiguous, in not shewing and stating upon what commission or commissions, or fiat, or other proceeding or proceedings in particular the defendant relied, but leaving it to the plaintiff to conjecture what was the precise defence, and in what persons, and under which of the said proceedings the defendant meant to contend that he had an answer to the action — that the defendant ought to have shewn (but had not) that there were or was, at the time of the commencement of the suit, some persons or person in whom the right to sue on the bills, and for the causes of action declared on, had vested, and the plea should have expressly alleged that the same or some of them had so vested, and so have given the plaintiff an opportunity of answering such averment — that it ought to have been shewn that an assignee or assignees was or were appointed, and at the time of the commencement of the suit in existence under the first-mentioned commission — that it ought to have been shewn that *Harberd* or some other person continued to be assignee under the secondly named commission — that it was not shewn that there were, at the commencement of the suit, any assignees or assignee existing under the commission thirdly mentioned, or under the fiat, and entitled to sue upon the bills or upon the statement of account in the declaration mentioned — that it was nowhere alleged and shewn in the plea that the debts alleged to have been due and owing

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by the plaintiff were, at the time of the accruing of t causes of action in the declaration mentioned, or any them, or at the commencement of the suit, or at t time of pleading the said plea, actually unpaid or s due from the plaintiff, nor that the said commissio or the said fiat, or the assignments in the plea m tioned, or any of them, were still in force or operation that the defendant was estopped from stating and relyi on the fiats set forth in the plea, as he had, by accepti the bills and stating the account, conclusively admitt the plaintiff's competency to draw the bills and to st an account — that it was not now competent to the d fendant to deny the validity of the drawing of the bill or the said statement of account, or the right of th plaintiff to sue in respect thereof — that it was n alleged or shewn that the causes of action in the d claration mentioned were part of the estate and effec of the plaintiff that would, under the provisions of an statute, vest in his assignees or assignee under any com mission or fiat in bankruptcy — that it did not appe that the plaintiff's supposed assignees, or any of them had interfered with his bringing the action, or had di sented therefrom, or had claimed from the defenda the amount of the sums in the declaration mentione or any of them, &c. Joinder.

Channell Serjt. (with whom was *Lusk*), in support the demurrer. If this plea can be supported, it mu be on the ground that, not denying the contracts in t declaration, it shews that the right of action thereon vested in some other party than the plaintiff. T plea, however, does not allege that any of the proce ings took place between the drawing and accepting the bills and the time of payment; neither is it aver that any of the assignees have interfered with resp to these particular debts. Under these circumstan

it can be no defence for an acceptor, to say that the payee cannot sue him upon the express contracts into which he had entered. It is apprehended that, according to the general rule, the defendant is estopped from setting up this defence; for, by accepting the bills, he admits the right of the payee to sue upon them. (*a*) It is clear, that if this had been an action by an indorsee, the defendant, by his acceptance, would have been precluded from denying the right of the payee to indorse; *Pitt* v. *Chappelow*. (*b*)

The plea is also bad for duplicity. Where a plea sets up several defences it is open to this objection, though one of the defences may not be well pleaded; *Wright* v. *Watts*. (*c*) It is impossible for the plaintiff to discover on which commission the defendant means to rely; and as it is conceived that the plaintiff could not, by replying *de injuriâ* to the plea, have put all the proceedings in issue, the defendant has no right to call on the plaintiff to say for him which is the material part of the plea. In *Till* v. *Wilson* (*d*) a second commission issued against a trader before the first was disposed of was held to be a nullity. So, in *Nelson* v. *Cherrill* (*e*), it was held, that pending a former commission of bankrupt a second is void, and that under it no rights pass to the assignees. Here, the defendant has left it uncertain in what assignees he means to contend the right to sue upon these bills is vested.

Bompas Serjt. (with whom was *Ogle*), *contrà*. It is clear that immaterial matter will not operate so as to make a plea double. *Stephen on Plead.* 293. *et seq.*,

(*a*) *Vide Sanderson* v. *Collman*, *antè*, Vol. IV. p. 209. as to drawee's being estopped by his acceptance, to deny the *signature* of the drawer.

(*b*) 8 *M.* & *W.* 616.

(*c*) 3 *Q. B. Rep.* 89., 2 *Gale* & *D.* 386.

(*d*) 7 *B.* & *C.* 684., 1 *M.* & *R.* 580.

(*e*) 8 *Bingh.* 316., 1 *M.* & *Sc.* 452.

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5th ed. The plea in question is founded on the 127th section of the 6 *G.* 4. *c.* 16., which vests in the assignees the future effects of any bankrupt whose estate has not produced 15*s.* in the pound under second commission; *Young* v. *Rishworth* (*a*), *Benjami* v. *Belcher.* (*b*) [*Cresswell* J. In which set of assignee do you say this property is vested?] In the assignee under the third commission. [*Cresswell* J. Why n in those appointed under the second commission *Erskine* J. How is the plaintiff to know that you rel on the third commission?] An executor, when sue in respect of a simple contract debt of his testator, ma plead several judgments, each of which might of itsel constitute a defence to the action. [*Cresswell* J. There the whole are component parts of one defence, namely: that the assets are exhausted.] *Young* v. *Rishworth* and *Benjamin* v. *Belcher* shew that if the plaintiff were to recover in this action the defendant would still be liable to an action at the suit of the assignees, to which the recovery by the plaintiff would be no bar.

TINDAL C. J. There can be no doubt that this ple is double, for it contains several matters, each of whic would constitute a defence to the action. In *Treveliæ* v. *Seccomb* (*c*), where the defendant pleaded ten outlawrie of the plaintiff on *mesne* process in disability of hi action, and prayed judgment if any answer ought to be made whilst those outlawries were unreversed, it was held on demurrer that the plea was ill for duplicity, "because the plaintiff is disabled as well by one outlawry as by all the other nine, to which several answers are required." So here, if either the second or the thir

(*a*) 8 *A.* & *E.* 470., 3 *N.* & *P.* 585.

(*b*) 11 *A.* & *E.* 350., 3 *P.* & *D.* 317.

(*c*) *Carth.* 8., 1 *Show.* 80 *Comb.* 162.

commission be taken in connection with the first, there is a complete answer to the action. I am not, however, prepared to say that the defendant ought not to be allowed to amend on payment of costs, although the defence is not a very gracious one.

Per curiam;

Rule absolute to amend on payment of costs within fourteen days.

An application by *Bompas* Serjt. to divide the defence into several pleas was refused. (*a*)

(*a*) If the defendant had originally applied for leave to plead these matters severally, such leave would scarcely have been refused. Compelled to elect between transactions to which he was a stranger, a defendant may fail in the formal proof of one of the two bankruptcies, &c. which he has selected; whereas some one or more of the others might have afforded a complete answer to the action. After being compelled to pay the debt to the bankrupt, he may be called upon to pay it over again to the assignees, who will not be bound by the restriction imposed upon the debtor.

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Jan. 24.

DEBT, for goods sold and delivered, and upon an account stated.

Plea: first, *nunquam indebitatus;* secondly, as to 8*l.* 18*s.* 8*d.*, parcel of the sum demanded — that after defendant became indebted to the plaintiff in such sum, and before the commencement of the suit, to wit, on the 3d of *March* 1842, the plaintiff *Ford*, then being a prisoner in actual custody within the walls of the *Fleet* prison, upon process at the suit of one *Henry Edwards*, for the recovery of a debt then due from *Ford* to *Edwards*, did within fourteen days next after the commencement

A debt accruing to an insolvent between the vesting order and the final discharge, vests in his assignee under 1 & 2 *Vict.* *c.* 110. *s.* 37.

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of the said actual custody of *Ford*, to wit, on th and year last aforesaid, duly and according to the tion and provisions of a certain statute made and in the second year &c., for abolishing arrest on process in civil actions, except in certain cas &c. (*a*), apply by petition in a summary way court for relief of insolvent debtors in the said ac tioned for his discharge from such custody as afo according to the provisions of the said act; in petition the now plaintiff stated that he was willi all his real and personal estate and effects sho vested in the provisional assignee for the time b the estate and effects of insolvent debtors in *En* according to the provisions of the said act, and to be discharged from custody, and to have future of his person against the demands for which *Fo* then in custody, and against the demands of all persons who should be, or claim to be, creditors o at the time of the presenting of the said petition which petition was then duly subscribed by *For* was forthwith, to wit, on &c., filed of record in th court pursuant to the directions in the said act cont that on the filing of the said petition and befo commencement of the suit, to wit, on &c., the said in pursuance of, and according to, the said statu dered that all the real and personal estate and eff *Ford* both within this realm and abroad (except *and also all the future estate, right, title, interes trust of* Ford, *in or to any real or personal esta effects within this realm or abroad,* which *Ford* migh chase, or which might revert, descend, or be devi bequeathed *or come to him* before he should becor titled to his final discharge in pursuance of the sa and according to the adjudication made in that

(*a*) 1 & 2 *Vict. c.* 110.

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in case *Ford* should obtain his final discharge from body without any adjudication being made by the said rt before *Ford* should be finally discharged from body, all debts due or growing due to *Ford, or to be o him before such discharge as aforesaid*, should be ed in *Samuel Sturgis*, then and still being the provi- al assignee &c.; which order was then duly entered ecord in the said court &c., and notice of the said r was duly published, according to the directions of said court; by virtue of which order, and of the said ute, the said debts and sums of money in the declar- n mentioned, as far as the same relate to the said sum *l.* 18*s.* 8*d.*, parcel &c., became and were vested in *gis* as assignee as aforesaid of *Ford;* that after the ing of the said vesting order, and before the com- cement of the suit, to wit, on the 9th of *June* 1842, *Charles Morgan* was duly appointed by the said rt assignee of the estate and effects of *Ford*, for the poses of the said act, and *Morgan* then accepted and ified to the said court his acceptance of the said intment, which appointment and the acceptance e then respectively entered of record in the said rt &c.; and thereupon by virtue of the said appoint- t and the said acceptance thereof by *Morgan*, and virtue of the said statute, the said debts and sums oney in the declaration mentioned, as far as the e relate to the said sum of 8*l.* 18*s.* 8*d.*, parcel &c., ame and were, and now are, vested in *Morgan* as h assignee as aforesaid. Verification.

Replication: to the first plea, similiter; to the second a, that the plaintiff did not, after the defendant be- e indebted to him in the sum of 8*l.* 18*s.* 8*d.*, parcel , he the plaintiff then being in custody as in that a mentioned, apply by petition in a summary way to e said court for his discharge from such custody, ac- rding to the provision of the act, *modo et formâ*, con- ding to the country. Similiter.

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The particulars of demand claimed a balance of 8*l.* 18*s.* 8*d.*

At the trial before the sheriff of *Middlesex*, on the 12th of *January* instant, the following facts appeared: *Ford* the plaintiff, a pill-box maker, supplied the defendant, a druggist, between the 5th of *March* and the 14th of *May* last, with goods amounting to 18*l.* 4*s.* 2*d.*, of which 9*l.* 5*s.* 6*d.* had been paid, leaving 8*l.* 18*s.* 8*d.* due.

On the 2d of *March Ford* was arrested, and on the next day his petition was filed, and a vesting order obtained. On the 10th of *May* he was discharged.

The under-sheriff told the jury that all debts accruing to the insolvent *prior to his discharge*, were vested in the assignee.

The jury having returned a verdict for the defendant upon the second issue, leave being given to the plaintiff to move to enter a verdict for the 8*l.* 18*s.* 8*d.*,

Channell Serjt. obtained a rule nisi for entering a verdict for the plaintiff for 8*l.* 18*s.* 8*d.* on the ground that the plea was not proved, or for a new trial on the ground of misdirection.

Dowling Serjt. now shewed cause. At the time this action was brought the right of action was vested in the assignee of the plaintiff by virtue of the provisions of 1 & 2 *Vict. c.* 110. *ss.* 35. 37. 45. It will be contended on the other side that the last two sections are modified by ss. 69. 75. 87, 88. But these sections do not control the clear provisions for the vesting of the estate contained in the thirty-seventh and forty-fifth sections. Sect. 69. requires the insolvent to deliver a schedule into court within fourteen days next after the making of the vesting order; but though no debts could be included in the schedule which were not then due or becoming due, it by no means follows that debts subs

quently accruing should not vest in the assignee. Sect. 75. only compels the insolvent to charge property acquired *after his discharge*, clearly because it was considered that *up to* that period no such charging was necessary. Sect. 87. and 88. do not affect the question, which, after all, comes back to the construction to be put upon the language of the thirty-seventh and forty-fifth sections. [*Tindal* C. J. Is the issue taken here a material issue? The question is, whether the defendant was indebted to the plaintiff before the discharge. *Channell* Serjt. If the allegation traversed by the replication had been omitted, the declaration would have been insufficient. *Cresswell* J. You say that that only is immaterial which leaves a good matter of defence unanswered.] The essential part of the plea is that the debt accrued due before the plaintiff's discharge. [*Tindal* C. J. You contend that such is the meaning of the plea.] After verdict it may be taken as an allegation that the debt accrued before the plaintiff's final discharge. The substantial question between the parties has been submitted to the jury. [*Cresswell* J. If the direction of the under-sheriff was right, you are entitled to retain your verdict: if that direction was wrong, the verdict cannot help you.] The objection would, if it prevailed, only lead to a repleader, or an arrest of judgment. That is a sufficient answer to that part of the rule which relates to the entering of a verdict for the plaintiff, except on the plea of *nunquam indebitatus;* to which extent the defendant does not resist the present rule. Nor is there any ground for granting a new trial. The substantial merits are with the defendant; and the plea sets out a sufficient title in the assignees, to whom the property was vested by the thirty-seventh and forty-fifth sections.

Channell Serjt. in support of the rule. It may be admitted that the plaintiff cannot succeed upon the first

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branch of his rule, which should have formed the subject of an application to the judge who tried the cause. That part of the case, therefore, may be left entirely out of consideration.

The first point to be considered will be, what property passed to the assignee. Secondly, assuming that debts accruing to an insolvent up to the period of his final discharge, vest in the assignee, whether the plea is adapted to the case set up.

If only the debts due at the time of the making the vesting order pass, then the issue is one which clearly ought to be found for the plaintiff. [*Cresswell* J. The words are "due or accruing due."] Looking at the whole of the act it appears that only two classes of debts were intended to vest or be vested in the assignee—debts due at the date of the vesting order, and debts then accruing due, as bills of exchange or promissory notes having a certain time to run. The petition may be presented either by the debtor or by a creditor. Within fourteen days a schedule is to be filed. The insolvent is then heard upon his petition, and is discharged forthwith, or according to his conduct. The judgment directed to be entered up on the warrant of attorney is a judgment against the person himself. The eighty-eighth section provides for the case of property acquired after the discharge.

The whole difficulty arises out of the words "or to be due to him or her before such final discharge." [*Tindal* C. J. The plea would leave an interval unprovided for. *Erskine* J. And all for the sake of putting a forced construction on the word "or."] The court will read the thirty-seventh section in connection with the others. The insolvent is discharged only for debts due *from him* at the time of the vesting order. [*Cresswell* J. As all the profits of the insolvent were vested in the assignee, he could not sell to the defendant. *Tindal* C. J. Does

appear that the issue, as framed, is an immaterial
' Is there any other course than a repleader?]
her there must be a repleader or not will depend
the question whether there is error on the record.
lea is in confession and avoidance. [*Tindal* C. J.
ı they put the line of division in the wrong place,
lid you not set it right by your replication?] The
good upon the face of it. It states, that after the
ecame due, and before the bringing of the action,
aintiff applied by petition to the insolvent debtors'
. It lies upon the defendant to shew that the
iff is disentitled to sue for the amount of the goods
ı he has sold to the defendant. The plea might
been framed more correctly, but it is not a bad plea.
nan J. Could we say that the defendant is to re-
, he having made the first blunder?] If the plead-
good, it is so only by the allegation which is
sed. It may be doubted whether this is a case
ıich a repleader can be awarded. [*Cresswell* J.
defendant, by putting that allegation in his plea,
des the supposition that it may have accrued after
laintiff's discharge. That is not the effect of the
rse. *Tindal* C. J. Your ground is, that the defend-
as not taken so favourable an issue as he might
done. The case came before us on a question of
rection on the part of the under-sheriff, in sub-
ıg to the jury whether this was a debt accruing
e plaintiff before his first discharge instead of fol-
g the terms of the issue. *Coltman* J. May it not
out in some cases that the issue is material or im-
rial according to the finding?] It may be assumed
he judge would have amended. [*Tindal* C. J. It
ges the line of division.]

NDAL C. J. The direction of the under-sheriff
s to be right in the abstract with reference to the
sions of the act, but it was a wrong direction with

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respect to the issue joined upon the record. I cannot say that the plea is bad, but if found one way it will be a ground for a repleader. If the parties choose to apply to amend, it will be granted; if not, it must take its own course. Any costs of the amendment should be costs in the cause.

Channell Serjt. on the part of the plaintiff, acceded to the terms of the defendant being allowed to amend without costs.

Rule accordingly.

Jan. 25.

WOOLLEY and Another *v.* REDDELIEN.

A charter-party (or memorandum of charter), by which it is agreed that the ship, after delivering her outward cargo at *Malta*, shall, with all convenient speed, sail to one of several ports as shall be ordered at *Malta*, contains an implied promise, on the part of the charterer, that the ship shall be ordered at *Malta* to sail to such port within a reasonable time after her arrival at *Malta*.

ASSUMPSIT. The declaration stated that on the 24th of *December* 1841, by a certain charter-party (memorandum of charter) then made between the plaintiffs, owners of the coppered ship called the *Robert Johnson* master, of the measurement of 300 tons or thereabouts, then lying in the port of *London* and on the point of sailing for *Malta* with government stores of the one part, and the defendant of the other part, it was witnessed that the said ship, being tight &c., after delivering her outward cargo, should, with all convenient speed, sail and proceed to *Marseilles*, *Genoa*, or another safe port on the west coast of *Italy*, or a safe port on the east coast of *Italy*, not higher than *Manfredonia*, *as should be ordered at Malta*, or so near thereunto as she could safely get, and there load from the factors of the defendant a full and complete cargo of wheat or other lawful merchandize, not exceeding

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he could reasonably stow and carry over and her tackle, apparel, provisions and furniture; and so loaded should therewith proceed to a good and rt in the United Kingdom (*Gloucester* excepted) at *Cork* or *Falmouth* for orders, or so near nto as she could safely get, and deliver the same ng paid freight as follows, 6*s.* per imperial quarter, ., the act of God &c. always excepted; one half freight to be paid in cash on unloading and right ry of the cargo, and the remainder by good ap- l bills on *London*, at three months following; running days to be allowed the defendant (if the hould not be sooner dispatched) for loading and ry, and ten days on demurrage over and above the aying days, at 7*l.* per day. The declaration, after out a penalty for non-performance of the agree- stated that the charter-party being so made, after- , to wit &c., in consideration thereof, and that the iffs had then promised the defendant to perform ulfil the charter-party in all things on their part to rformed and fulfilled, the defendant promised the iffs to perform and fulfil the charter-party in all on his part to be performed and fulfilled, *and that aid ship should be ordered at Malta to sail and d to such port as in the said charter-party is men- within a reasonable time after the arrival of the hip at Malta aforesaid.* Averment: that although laintiffs had performed and fulfilled &c., and igh the said ship within a reasonable time of ig of the said charter-party, to wit, on the day and aforesaid, did set sail and proceed to *Malta* afore- and although the same ship within a reasonable in that behalf after her arrival at *Malta* aforesaid he delivery of her outward cargo, to wit, on the of *March* 1842, was tight, staunch, and strong, and way fitted for the voyage in the charter-party ioned, and although the same ship was then ready

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with all convenient speed to sail and proceed to *Marseilles*, *Genoa*, or another safe port on the west coast of *Italy*, or a safe port on the east coast of *Italy*, not higher than *Manfredonia*, as should be ordered at *Malta*, yet the defendant did not nor would within a reasonable time in that behalf cause the said ship to be ordered at *Malta* to sail and proceed to such port as aforesaid, but detained the said ship at *Malta* waiting for such order for a long and unreasonable space of time, to wit, twenty-eight days, whereby the plaintiffs were put to much cost and charge, and expended a large sum of money, to wit, 300*l.*, in and about the maintenance of the master and mariners of the said ship during the time aforesaid, and lost and were deprived of great gain and profits which they would otherwise have had and acquired by the use of the said ship during the said time; and although the defendant afterwards, to wit, on the 22nd of *April* 1842, ordered the said ship to proceed to a certain port within the meaning of the charty-party to wit, *Barletta*, and although the said ship did then accordingly sail and proceed to *Barletta*, and the master was then ready and willing to load, and did afterwards to wit, on the 3d of *June* 1842, load on board the said ship at *Barletta* from the factors of the defendant a full and complete cargo of wheat, and being so loaded did proceed therewith to *Falmouth* for orders, and being there ordered to proceed to a certain good and safe port in the United Kingdom, to wit, *Dublin*, did thereupon accordingly proceed to the same port and there deliver the said cargo to the defendant's agents, according to the tenor and effect of the charter-party, yet the defendant did not nor would, within the number of days in the charter-party mentioned, load the said ship with the said cargo at *Barletta*, and dispatch her from thence on the said voyage and deliver the said cargo at the said port of discharge, according to the true intent and meaning of the charter-party and of the defendant's pro

mise in that behalf, but, on the contrary thereof, detained the said ship after she was ready to receive her cargo aforesaid at *Barletta*, and the defendant had notice thereof, and after she was ready to deliver the same at *Dublin*, and the defendant had notice thereof, in and about the loading and unloading of the said ship at the said places respectively a long space of time, to wit, fifty days, over and above the said running days and ten days of demurrage in the charter-party mentioned, whereby the plaintiffs were put to further great costs and charges to a large amount, to wit, 500*l.*, in and about further maintaining the master and mariners of the said ship for the time last mentioned, and lost and were deprived of the use of the same and all profits thereof during the time aforesaid; and although by reason of the premises a large sum of money, to wit, 722*l.* 9*s.* 6*d.*, became due and payable to the plaintiffs as and for the freight of the said ship for the voyage aforesaid according to the terms of the charter-party, to be paid as therein mentioned; and although the defendant had paid more than half of the sum due for the said freight, to wit, 689*l.* 12*s.* 6*d.*, and although the plaintiffs, to wit, on the 16th of *August* in the year aforesaid, requested the defendant to pay them the remainder of the said sum of 722*l.* 9*s.* 6*d.*, so due for freight as aforesaid, by good approved bills on *London* at three months following, yet the defendant had not paid the remainder of the said sum of 722*l.* 9*s.* 6*d.* by such good approved bills upon *London* or otherwise; and although by reason of the premises a further large sum of money, to wit, 210*l.*, became due and payable to the plaintiffs as and for demurrage for the detention of the said ship at *Barletta* and *Dublin* for the days of demurrage in the charter-party mentioned, yet the defendant had not paid to the plaintiffs the last-mentioned sum of money or any part thereof, but to pay the same, &c.

General demurrer and joinder,

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Channell, in support of the demurrer. The declaration avers "that the defendant promised that the ship should be ordered at *Malta* to sail and proceed to such port as in the charter-party is mentioned." The defendant made no such promise. The ship was to discharge her cargo, and from that time the contract was to take effect. [*Cresswell* J. The ship is to sail immediately or with all convenient speed after the discharge of the outward cargo. But it may have been the duty of the defendant to give his orders before the discharge.] The declaration is bad if the promise alleged is not co-extensive with the consideration. There is nothing to shew that the defendant was bound to give orders for the homeward voyage before the outward cargo was discharged. [*Erskine* J. It is not so alleged. The allegation in the declaration is that orders were to be given within a reasonable time after the ship's arrival at *Malta*.] The declaration, in setting out the consideration for the defendant's promise, contains no allegation of a *request* on the part of the defendant. (*a*)

Bompas Serjt., *contrà*. In the contract of charter entered into between these parties is implied an engagement, to give orders within a reasonable time after the arrival of the *Robert* at *Malta*, for that ship to proceed to a port of loading. The declaration, therefore properly states a *promise* on the part of the defendant to that effect; *Whitwill* v. *Scheer*. (*b*) [*Cresswell* J. The question is, whether if the special promise had been omitted, the plaintiff could have assigned a breach in not giving orders within a reasonable time after the arrival of the vessel at *Malta*.]

(*a*) *Vide Osborne* v. *Rogers*, 1 *Wms. Saund.* 264. n., *antè*, Vol. I. 266. n. *Victors* v. *Davis*, 21 *Law Journal*, 214.

(*b*) 8 *A. & E.* 301., 3 *N. P.* 398.

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Channell Serjt. in reply. It is not contended that a plaintiff may not state in his declaration a promise to the effect of any implied engagement necessarily arising out of the written contract. But it is submitted that here no such engagement is to be implied.

TINDAL C. J. The question in this case is, whether the terms of the written contract will support the promise on which the plaintiff has declared. The words "with all convenient speed" clearly apply to the sailing of the ship, and not to the orders under which she is to sail. But the convenience of the parties, and the good reason of the thing require that the orders for sailing from *Malta* should be given within a reasonable time after the arrival of the vessel at that port; and the language of the contract being susceptible of that construction, I am of opinion that the promise is well laid, and that the demurrer must be overruled. (*a*)

ERSKINE J. I am of the same opinion. I think the declaration properly alleges a promise to give orders within a reasonable time after the arrival of the ship at *Malta*. What would be a reasonable time after the arrival, would, if put in issue, be a question for a jury. Upon the trial it *might* appear to be reasonable that the orders should be deferred until after the discharge of the outward cargo; but it does not appear to me that the promise resulting from the memorandum of charter is *limited* to that period.

CRESSWELL J. I am of the same opinion. There is nothing to shew that the orders are not to be given before the discharge of the outward cargo, if it be reasonable that they should be so given.

Judgment for the plaintiff.

(*a*) *Vide antè*, Vol. I. 202.

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The declaration stated, that theretofore *to wit*, on the 24th of *Dec.* 1835, by an agreement in writing then made, it was agreed that certain bills which had been drawn upon a company (of which the defendant was a member), should be taken up by the plaintiffs; that in the event of the plaintiffs declining to take shares in the company, which they had the option to do, the defendant should repay the

ASSUMPSIT. The first count of the decl stated that before and at the time of mak agreement and promise thereinafter mentioned, fendants were partners and shareholders in a company or association called the *Anglo-Americ Mining Association;* that theretofore, to wit, 24th of *December* 1835, by a certain agreem writing then purporting to be made between *Blundell* (one of the defendants) and certain oth sons, then being the agents of the said other def in that behalf, for and on behalf of themselves, the said company of the one part, and the plai the other part — after reciting that the member said company or association being desirous of ob the co-operation of the plaintiffs in carrying concern, and having determined to increase the n of shares of the company, proposed to the plai become shareholders and directors in the compa that the plaintiffs having found, on investigati concerns of the company, that questions and c had arisen and were pending between the comp one *John Penman*, its late superintendent or a *North Carolina*, who had drawn bills of exchan large amount on the said *Henry Blundell* on

sums advanced by the plaintiffs at any time after the 1st of *October* then the company having three months' previous notice requiring such re The declaration, entitled of the 16th of *December*, alleged that *after* the of the agreement, and more than three calendar months *before* the co ment of the action, the plaintiffs gave notice to the company that they to take the shares, and required payment, at the expiration of three months then following, of the sum advanced by them.

Held, that, notwithstanding the day of the making of the agreement w a *videlicet*, it sufficiently appeared on the face of the declaration, that *October* had elapsed before action brought.

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f the company, declined to become shareholders until hey had an opportunity of ascertaining the state of the ompany in reference to the questions and disputes so eferred to; but that the directors and members of the ssociation being desirous that the bills so drawn by the aid *John Penman* on the said *Henry Blundell* should not go back dishonoured, but should be taken up for the honour of the drawer under the guarantee and indemnity of the directors and of the company, the plaintiffs consented and agreed to take up the said bills to an amount not exceeding 6000*l.* upon the footing so proposed, and that the sum to be so advanced by them, together with such further sum, if any, as should be required to make up the said sum of 6000*l.* should, in the event of their determining to join the company at the period thereinafter mentioned for that purpose, go in payment of shares to the amount to be taken by them accordingly; and after reciting that at a meeting of shareholders of the company duly convened and held at &c. on the 17th of *December*, it was resolved and determined that 100 additional shares of 100*l.* each should be created for the purposes, and be disposed of by the directors for the benefit, of the company; and that sixty of such shares had been set apart with a view to, and in compliance with, the proposal thereinbefore mentioned in that behalf — it was and is witnessed, and it was thereby mutually concluded and agreed as follows, that is to say; that bills not exceeding the amount of 6000*l.* drawn by *Penman* on *Blundell* on account of the company, should be taken up by the plaintiffs for the honour of the drawer; and that the plaintiffs should follow the instructions of the company or of its agent or agents duly authorised for that purpose, whether as to proceeding against *Penman* or against the property of the company, or otherwise, in respect of the said bills; and that in the event of the said bills, or any or either

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of them, not being paid, and of the plaintiffs not making their election to take the sixty shares so reserved and set apart for them, the defendants engaged and agreed for the payment of such bills or bill, with interest at five per cent. on the amount advanced, and all costs and expenses attending such bills at any time after the 1st of *October* then next, on the said company and directors of the said company having *three calendar months' previous notice* requiring the same; and that in case the plaintiffs or any or either of them should within two months after receiving from the directors of the said company a communication of the result of the questions or differences between the company and the said *John Penman*, and of the state of the company's affairs (and which communication the directors were to make in as full and explicit a form, and at as early a period, as should be in their power), or at any earlier period determine to take the sixty shares so reserved and set apart as before mentioned, such shares to be taken at par as thereinbefore mentioned, they or he should be at liberty so to do; and in that case the money so advanced in taking up the bills as thereinbefore mentioned, with such further sum, if any, as should be necessary to make up the sum of 6000*l.*, should go in payment of such sixty shares; but the plaintiffs should, in that case, be entitled only to the costs and expenses attending the said bills, and not to any interest. And it was and is thereby further agreed that in the event of the plaintiffs or any or either of them taking the said sixty shares they or he should, if they or he at the time of taking such shares should declare such to be their or his wish, be elected directors or a director of the company jointly with the then directors as by said agreement fully and at large appears. Mutual promises. Averment—that after the making of the said agreement, to wit, on the day and year last aforesaid, and on divers other days and times after that day, and more than three calendar

months before the commencement of this suit, the plaintiffs paid, laid out, and expended divers large sums of money not exceeding, in the whole, the said sum of 6000*l.* mentioned in the said agreement, to wit, the sum of 5800*l.* in and about the taking up and discharging for the honour of the drawer divers of the said bills of exchange in writing, before drawn by the said *John Penman* on the said *H. Blundell* for and on account of the said company, for the payment respectively of divers large sums of money, amounting in the whole to a large sum, to wit, the sum of 5800*l.* at certain times, which respectively elapsed long before the commencement of this suit pursuant to and upon the terms of the said agreement, the said bills being respectively bills which had been and were dishonoured, and not paid or taken up by any or either of the parties thereto; that the plaintiffs had always been ready to follow, and had followed the instructions of the company, and of their agents duly authorised for that purpose in respect of the said bills as aforesaid; *that afterwards, and more than three calendar months before the commencement of this suit,* the plaintiffs gave due notice, to wit, to the said company and to the said directors, that they the plaintiffs declined to take the said sixty shares in, or to become members of, the said company, and the plaintiffs then elected not to take, and had not, nor have any or hath any one of them taken, such shares, nor have nor hath any or either of them become such shareholders or shareholder; and the plaintiffs then gave the company and the directors notice to pay, and required payment to them the plaintiffs according to the said agreement, at the expiration of three calendar months then following, of the said sum of 5800*l.* so advanced by them in taking up the said bills of exchange as aforesaid, with a certain sum, to wit, 500*l.* being interest for the same at the rate of 5 per cent. per annum, then due and claimable thereon

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and in respect thereof; and also a certain sum, to wi[t] 300*l.* being the amount of the costs and expenses of th[e] plaintiffs attending the taking up of such bills and in re[la]tion thereto, and by the plaintiffs then incurred in th[at] behalf according to the said agreement; and *althoug[h] the time for payment of the said several sums of* 5800*l.*, *500l. and* 300*l. elapsed before the commencement of th[e] suit*, yet the defendants, not regarding their said agre[e]ment or their said promises, had not paid or caus[ed] to be paid to the plaintiffs, or to any or either of the[m], the said sums of 5800*l.*, 500*l.*, and 300*l.* or any or either of them, or any part thereof, but had and each of the[m] had therein failed and made default, and the last-men[tioned] three several sums of money still remained wholly due and unpaid and unsatisfied and in arrear and unpaid to the plaintiffs, nor had any part thereof been paid to the plaintiffs, by or on behalf or either of the said parties to the said bills so taken up by the plaintiffs, or by or on behalf of the said company, or otherwise satisfied. The declaration also contained counts for money lent, money paid, and money found due upon an account stated.

The defendant *Joseph Sidwell Heathorn* pleaded fifthly to the first count, so far as it related to two of the bills therein mentioned to have been taken up by the plaintiffs, that the defendants were not, at the time when the said bills were drawn, and which were not accepted, partners or shareholders in the said company. Verification.

Sixthly, to the same count, that the bills in the first count mentioned were drawn for debts contracted before the said *Heathorn* became a shareholder in the said company; and that he did not in any manner become a party to, or assent to the drawing or issuing, or negotiation of, the said bills. Verification.

There was a special demurrer to these pleas, assign-

ing for causes, that they did not deny, or confess and avoid, the causes of action to which they were pleaded, and that they amounted to the general issue, &c. Joinder.

W. H. Watson, in support of the demurrer, submitted that these pleas disclosed no answer to the action; it being perfectly immaterial whether the defendants were parties to the bills, as there was abundant consideration for the promise to repay the plaintiffs the amount advanced by them in taking up the bills.

Channell Serjt. was then called upon by the court. It is conceded that these pleas cannot be supported; but it is contended that the declaration is bad, which represents the obligation on the defendants to be, to repay the money to the plaintiffs "at any time after the 1st of *October* then next, on the company's having three calendar months' previous notice requiring the same." The question is, whether the defendants are liable to repay the money at any time after the 1st of *October*, or at three months' notice from the 1st of *October*. It is submitted that the proper meaning is, that the defendants are to pay the money on three months' notice after the 1st of *October*; but whether that or the other construction be adopted, there is no allegation that the 1st of *October* had passed before the commencement of the suit. For the date of the agreement being laid under a *videlicet*, it is clear that the plaintiffs might, on non assumpsit being pleaded, prove an agreement of any other date. *Parkinson* v. *Whitehead* (*a*) resembles this case. There the declaration stated, that theretofore, to wit, on the 31st of *May* 1825, by an agreement in writing then made, the defendant's testator agreed,

(*a*) *Antè*, Vol. III. p. 329.

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among other things, within two years from midsummer *then next*, to build certain houses, and alleged for breach, that the houses at the commencement of the action (1839) were unbuilt, contrary to the agreement. The declaration was held bad on general demurrer, for not shewing distinctly that two years from midsummer next after the making of the agreement had elapsed previously to the commencement of the suit.

ERSKINE J. The declaration, which is entitled of the 16th of *December* 1837, alleges that, *after* the making of the agreement, and more than three calendar months before the commencement of the action, the plaintiffs gave the company due notice that they declined to take the shares, and required payment at the expiration of three calendar months then following, of the moneys advanced by them. Does not that allegation meet your objection, that it does not appear on the declaration that *a* 1st of *October* had elapsed before action brought?

Per curiam;

Judgment for the plaintiff.

)K and Others, Assignees of WILLIAM HITCHCOCK, a Bankrupt, *v.* PRITCHARD. *Jan.* 15.

SSUMPSIT, for money had and received. Plea, non assumpsit.

t the trial before *Tindal* C. J., at the adjourned ıgs in *London* after *Michaelmas* term last, it appeared this was an action brought by the plaintiffs to recover ı the defendant the sum of 2000*l.*, alleged to have ı paid to him by the bankrupt by way of fraudulent ɛrence in contemplation of bankruptcy. The facts : as follows: —

he bankrupt had for some years carried on the ness of a linendraper in *Regent Street*. The deant was the holder of two bills of exchange for 1000*l.*, accepted by the bankrupt, bearing date respectively 19th of *April* and 10th of *May* 1841, and both pay- three months after date, the consideration for these being money lent by the defendant to the bankrupt. ın the first of these acceptances becoming due on the of *June* 1841, it was dishonoured. Four days before ɛecond bill became due, namely, on the 9th of *August*, ɔankrupt paid to his solicitors, Messrs. *M.* and *P.* ɔ were also the attorneys of the defendant), 200*l.* on unt of the first bill. The bankrupt made a second nent of 200*l.* to the defendant through the same ies, on the 18th of the same month, and between day and the 31st, paid them the several sums 00*l.*, 590*l.*, 400*l.*, and 10*l.*, amounting to the sum ht to be recovered in this action. The bankwas greatly embarrassed when these payments made. Some time previously he had sent large tities of goods to a commission agent in the city,

In an action by assignees of a bankrupt to recover money paid by the latter to the defendant, the judge, assuming, in favour of the defendant, that there had been importunity and pressure by him, left it to the jury to say whether the bankrupt had made the payments in consequence of such importunity and pressure, or with a view of giving the defendant a fraudulent preference in contemplation ofbankruptcy: Held, that this was a direction of which the *defendant* had no right to complain.

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with orders to sell them at a sacrifice of 25 per cent. During the months of *July* and *August*, he had dishonoured numerous bills; several actions had been brought against him; and eight affidavits filed by different creditors for debts to a considerable amount, under the stat. 1 & 2 *Vict. c.* 110. *s.* 8.; to the whole of which he had given bail. It also appeared that the bankrupt had told the holder of one of his dishonoured bills, that he should not pay some of his creditors, on the ground that they had not used him well, but that he should not give any fraudulent preference. At the time the payments were made, the defendant was abroad. The 200*l.* paid on the 9th of *August*, was paid without any demand on the part of the defendant; but it was proved that Messrs. *M.* and *P.* had made numerous and pressing applications on behalf of the defendant, previously to the subsequent payments, although no legal proceedings had been commenced. The defendant's debt was guaranteed by *George Hitchcock* the brother of the bankrupt. The fiat against the bankrupt was sued out on the 16th of *September* 1841. The act of bankruptcy was an assignment executed by him for the benefit of his creditors.

It was contended for the plaintiffs, that the evidence clearly shewed that the payments in question were made by the bankrupt with a view to give a fraudulent preference, and in contemplation of bankruptcy.

On the part of the defendant it was submitted, that it was not necessary for the defendant to shew that coercive measures had been adopted, or even threatened, it being sufficient that payment had been demanded; and that even supposing that *William Hitchcock* had contemplated bankruptcy, and made the payments in order to protect his brother, who was liable for the amount under his guarantee, that would not affect the defendant's right to retain the money.

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he Lord Chief Justice told the jury, that to entitle plaintiffs to recover, they were bound to establish : the payments by the bankrupt to the defendant e made with a view to a fraudulent preference, and contemplation of bankruptcy; and that, notwithding there had been pressure and importunity on part of the defendant, the question they had to con- r was, whether the payments were made in conseice of that pressure and importunity, or they were ntary, and with a view to give a fraudulent preference he defendant over other creditors.

The jury returned a verdict for the plaintiffs for the 0*l*.

Channell Serjt. now moved for a new trial on the und of misdirection. It may be conceded in this e that the bankrupt was proved to be in very emrassed circumstances, and that at the time the payits were made to the defendant, he had bankruptcy contemplation. The question, however, is, whether payments were voluntary; and the ground in which summing up is excepted to is, that the Lord Chief tice assumed that pressure was necessary to prevent ayment being voluntary; whereas it is sufficient if re has been a demand, and a payment afterwards. though it seems to have been held in the older author- s that *pressure* is necessary, later cases have decided t it is not the proper test whereby to ascertain whe- r the payment is voluntary. In *Doe dem. Lamb* v. *lett* (*a*) the court of Exchequer were called upon to a construction on the word "voluntary" as used he insolvent debtors' act. It was there held that in er to support a security made by an insolvent to a litor within three months before he was committed

(*a*) *Tyrwh. & G.* 114., 2 *C. M. & R.* 579.

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to prison, it was not necessary for the latter to prove pressure by him of the insolvent; it was for the assignees of the insolvent who sought to avoid the security under the provisions of the 7 *G.* 4. *c.* 57. *s.* 32. to make out that it was the voluntary act of the bankrupt So in *Mogg* v. *Baker* (*a*), in which case *Cook* v. *Rogers* (*b*) and *Doe* v. *Gillett* were cited, it was held that where a conveyance or transfer of goods is made by a party in insolvent circumstances to a creditor in pursuance of a *bonâ fide* demand by the creditor, it is not voluntary within the meaning of the same section. It is submitted upon these authorities, that importunity and pressure need not be shewn, but that it is sufficient if there has been a demand, and a payment in pursuance thereof. In the summing up of this case, however, the jury were led to conclude that pressure, or importunity amounting to pressure, was requisite. [*Tindal* C. J. The first payment of 200*l.* on the 9th of *August*, was previous to any demand being made. *Maule* J. Was there any evidence, that the bankrupt was paying other creditors? A single demand and payment might shew that the bankrupt did not select the particular creditor. But if ten creditors apply to him, and he puts off nine and pays the tenth, a jury may fairly infer a fraudulent preference in favour of the latter.] It is not contended that the jury might not have properly found that the bankrupt intended to give a preference to the defendant, but the complaint is, that from the summing up, the jury would not give the defendant the advantage of considering whether there had been a *bonâ fide* demand, and a payment in consequence of such demand. Had that point been left to them, the case might have been attended with a different result. [*Erskine* J. His lordship seems to have used the words "importunity and preference,"

(*a*) 4 *M.* & *W.* 348. (*b*) 7 *Bing.* 438., 4 *M.* & *P.* 573.

with reference to this particular case, and not as laying down any general proposition.]

Tindal C. J. As already observed, in summing up this case to the jury in the manner adverted to, I was not laying down any general rule of law, but merely applying myself to the facts of the case, I appear to have used the words "pressure" and "importunity" instead of demand; for all I intended to do, was to embody the evidence given in favour of the defendant. If the rest of the court think what I said was likely to mislead the jury, there ought to be a new trial.

Erskine J. It does not appear to me that the jury could have been misled by the way in which this case was left to them by the Lord Chief Justice. There was no question as to whether there had been importunity and pressure for the payment of this debt; for it was proved that both had been used. If his lordship had left it to the jury to say whether there had been any demand amounting to importunity and pressure, and had told them that if they came to the conclusion there was not, then the payments were not a fraudulent preference, the objection, now taken, would have arisen. The summing up turned, not upon any abstract proportion of law, but upon the particular facts of the case; and it was left to the jury to say, whether the bankrupt had *bonâ fide* made the payments in consequence of demands made upon him by the defendant's solicitors, or with the view of giving the defendant a preference over his other creditors. The evidence strongly shewed that the bankrupt sought to give the defendant a preference over his other creditors; for one payment was made to the defendant before there had been any demand at all, and all the payments took place while the bankrupt was in a state of hopeless embarrassment. Under these

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circumstances I cannot think that the jury could have been at all misled so as to suppose that importunity and pressure were necessary, in order to prevent the payments from amounting to a fraudulent preference.

MAULE J. I also think that there is no objection to the direction of the Lord Chief Justice. His lordship seems to have assumed that importunity and pressure had been proved, and, assuming that as a fact in the case, to have thought that the plaintiffs would still be entitled to recover, provided the jury came to the conclusion that the payments were made, not in consequence of the importunity and pressure, but in order to give a preference to the defendant. His lordship, in assuming the importunity and pressure, may be said to have decided matter of fact; but that constantly occurs. Nothing is more common, where the fact has been distinctly proved, and has not been contradicted by the other side than for a judge to assume the fact and not to leave it to the jury, although he undoubtedly would be bound to submit it to them if required to do so by either party. For example, in an action on a bill of exchange, where the issues raised are as to the acceptance and indorsement of the bill, supposing the acceptance to be proved by a witness, whose evidence is not attempted to be contradicted, would it be a misdirection if the judge were to tell the jury that the only question for their consideration was as to the indorsement? In this case the party to object to the assumption of importunity and pressure would have been the plaintiffs, and not the defendant; for the assumption was in favour of the latter.

CRESSWELL J. If the Lord Chief Justice had told the jury that the facts produced did not amount to importunity and pressure, I should have thought the case required reconsideration; but that appears to have

been very far from his intention. For if he thought that there was not any evidence of importunity and pressure, then there was no question for the jury, as it is quite clear that the payments were made by the bankrupt in contemplation of bankruptcy. It appears that the Lord Chief Justice left it to the jury to say whether the bankrupt had paid the money as a free agent or in consequence of the demands made by the defendant's solicitors. I do not see that any fault can be found with the summing up.

Rule refused.

FOOT *v.* BAKER.

Jan. 25.

DEBT, for 8*l.* 4*s.* money lent, and also for 8*l.* 4*s.* upon an account stated.

Plea: that the sum of 8*l.* 4*s.* in the first count mentioned, was borrowed by the defendant, as the plaintiff then well knew, and was knowingly lent by the plaintiff to the defendant, in a skittle-ground, in and part of a messuage wherein the plaintiff then carried on the trade and business of a publican and victualler (*a*), for the purpose of the defendant's illegally playing and gaming therewith, at and in the said skittle-ground, at a certain illegal game, to wit, the game of skittles, contrary to the statute in such case made and provided; and that the account in the last count mentioned, was stated of and concerning the said sum of 8*l.* 4*s.* in the said first count mentioned, and so borrowed and lent as aforesaid, and for, and in respect of, no other debts or moneys whatsoever. (*b*) Verification.

Semble, that money lent for the purpose of enabling the borrower to play at skittles for a less stake than 10*l.* may be recovered by the lender.

Secus, where the lender is a licensed publican who lends money to his guests to enable them so to play.

(*a*) The plea was afterwards amended, by describing the plaintiff as a *licensed* publican and victualler. *Vide post*, 339.

(*b*) This plea appears to be bad for duplicity. As the plaintiff claims *two* sums of 8*l.* 4*s.*, the account stated must be

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Special demurrer to the plea — for that the d alleges therein that the sum of 8*l.* 4*s.* in the fir mentioned was borrowed by the defendant, as th tiff well knew, and was knowingly lent by the to the defendant, for the purpose of the defenda gally playing and gaming therewith at a certai game, to wit, the game of skittles, contrary to tute in such case made and provided; whereas there is no statute in such case made or provi is there any statute rendering the game of skittle playing or gaming at the game of skittles, illega there any illegality in the game, or in the len money under the sum of 10*l.* to play at or there that if the defendant meant to say that the game tles, mentioned in his plea, was illegal under t visions of the 16 *Car.* 2. *c.* 7., then his plea was insufficient for not averring that such game w played, with the plaintiff's knowledge, otherw with and for ready money; and that, on the fac plea, it must be intended that such game was w for ready money; — that the plea contained no al or averment to bring the case within the provi the last-mentioned statute; — that if the defendar to say that the game of skittles in the plea m is illegal under the provisions of the 9 *Anne*, *c.* the plea was bad and insufficient for not averri such game of skittles was a game at which the de with the plaintiff's knowledge, was to play an thereat for a sum amounting to 10*l.* or more; the plea contained no averment whatsoever to b case within the provisions of the last-mentioned s

Joinder in demurrer.

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understood, as alleged by the plaintiff, to have been stated of sums *other* than that separately demanded in the first count, whether it be so expressed in the count or not. Thus th sides the special answe as a plea of *nunquam i* to the last count, or divided moiety of bot

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Channell Serjt., in support of the demurrer. The plea is bad, inasmuch as the sum to which it is pleaded is under 10*l.* The defendant is driven to contend that the game of skittles is, in all cases, illegal. [*Cresswell* J. That is, if played at *for money.*] The act of 16 *Car.* 2. *c.* 7. was passed, not for the purpose of denouncing certain games, but with the view of suppressing the *deceitful* practising of those games, and the playing at them for stakes of an *excessive* amount. This appears from the second and third sections of that statute; and it contains nothing which makes any game illegal. The 9 *Ann. c.* 14. is also an act "for the better prevention of *excessive* and deceitful gaming." [*Cresswell* J. It was held in a case in *Wilson* (*a*), that *cricket* was a game within that statute, and that a bond or security given by a third person for money won at cricket, was void.] That was an attempt, by the defendant, which proved successful (*b*), to avoid a security. But the bond given in that case was for money won exceeding 10*l.* The law upon this subject is distinctly laid down in the judgment delivered by Lord *Abinger* in *M'Kinnell* v. *Robinson.* (*c*) In the argument in that case, *Barjeau* v. *Walmsley* (*d*), *Robinson* v. *Bland* (*e*), and *Wettenhall* v. *Wood* (*g*) were cited. Where a bet is made for a sum under 10*l.* the amount may be recovered by the winner from the loser; *Hodson* v. *Terrill* (*h*), *Daintree* v. *Hutchinson.* (*i*)

Talfourd Serjt. *contrà.* The game of skittles is a game *ejusdem generis* with those which are enumerated

(*a*) *Jeffreys* v. *Walter,* 1 *Wils.* 220.
(*b*) "The parties agreed, *ut audivi,*" *ib.* 221.
(*c*) 3 *M. & W.* 434.
(*d*) 2 *Stra.* 1249.
(*e*) 2 *Burr.* 1077., 1 *W. Bla.* 256.
(*g*) 1 *Esp. N. P. C.* 16.
(*h*) 1 *C. & M.* 797., 3 *Tyrwh.* 929.
(*i*) 10 *M. & W.* 85.

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in the statute of *Anne*. These games are, cards, dice, tables, bowls, followed by the words, "or other game or games whatsoever." A horse-race has been held to be within the clause. Cricket, a game formerly unknown, has been held to be within the 16 *Car.* 2. *c.* 7. s. 3. The only question will be, whether the court of Exchequer came to a right decision in *M'Kinnell* v. *Robinson*. If, as was there held, the action upon the security is gone, the right to recover the moneys secured thereby is also taken away. In some cases, indeed, it seems to have been considered that the original debt might remain in force, although the security was destroyed. In the first of those cases, *Robinson* v. *Bland*, the circumstances were very peculiar, and the principle is not recognised in *Blagdon* v. *Pye*, which was decided after *Robinson* v. *Bland*, and in the same year, and *Young* v. *Mason* does not appear to have been adverted to. The mischief intended to be remedied, was, the inducing persons to game, by assisting them with the means of indulging a common and dangerous passion. [*Cresswell* J. Does it appear by the plea that the plaintiff was a *licensed* publican? A licensed publican cannot recover money advanced by him for the purpose of enabling the borrower to do an act which the publican is prohibited by his licence from suffering to be done.] That would bring the case within the principle of *M'Kinnell* v. *Robinson*, the publican being prohibited under a penalty from knowingly suffering any unlawful game or any gaming whatsoever (*a*) upon the licensed premises. [*Channell* Serjt. The plea does not allege that the plaintiff was a *licensed* victualler. *Tindal C. J.* The case is not within the statute of *Anne*, because it does not appear that the money was lent at the time of play, the words of the statute being "lent or advanced

(*a*) *Quære*, whether playing at a game lawful in itself, for a stake not prohibited in point of amount, can be said to be "gaming," within the meaning of the publican's licence.

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the time and place of such play."] The language of the 9 *Ann. c.* 14. *s.* 1. is in the *disjunctive*, "knowingly lent or advanced for such gaming or betting as aforesaid, *or* lent and advanced at the time and place of such play." The plea in this case is framed upon the first branch of the clause. [*Cresswell* J. If the money is lent at the time and place, the purpose of the loan is assumed. *Erskine* J. There is no penalty against an *unlicensed* person who suffers gaming on his premises.] It will not be presumed that the plaintiff is guilty of the offence of carrying on his business without a licence. (*a*) [*Cresswell* J. asked *Talfourd* whether the defendant would amend his plea by inserting an allegation that the plaintiff was a *licensed* publican. *Channell* Serjt., submitted that this was not a case for amendment. *Tindal* C. J. The lending of money by a publican to his own guests for the purpose of inducing them to game, is a very improper proceeding. *Channell* Serjt. The twenty-first section of 9 *G.* 4. *c.* 61. imposes penalties upon persons licensed under that act, who are convicted of offending against the form of the licence, and in that form there is a proviso against knowingly suffering "any unlawful games or any gaming whatsoever." The amendment therefore would still leave open the question, whether playing at skittles for less than 10*l.* was an unlawful act. *Cresswell* J. The term "*excessive* gaming," applied to playing or betting for an amount exceeding 10*l.*, implies that betting or playing for money to a less extent than 10*l.* is *gaming*. (*b*)]

Leave to amend, on payment of costs.

(*a*) The legislature having declared it to be unlawful for a licensed publican to suffer gaming on the premises, and having also made it penal to act as a publican without a licence, *quære*, whether the publican who disobeys the act by omitting to take out a licence, thereby acquires an exemption from its provisions, those provisions having reference not to the licence, but to the trade carried on.

(*b*) The amendment would, therefore, seem to have been merely *ex abundanti cautelâ*.

Jan. 11.

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A. was the holder of a foreign bill drawn upon *B.*, in *England*, and accepted by *B.*, payable at the banking-house of *C.* On the morning when the bill became due, *D.*, as *A.*'s banker, took the bill to the clearing-house in *London*, and put it into *C.*'s drawer. *C.* having examined the bill, and having funds of *B.*'s in his hands at the time, cancelled the acceptance by drawing lines across *B.*'s name, without rendering the acceptance illegible. In the course of the day *B.* finding himself to be insolvent, ordered *C.* not to pay the bill; whereupon *C.* wrote thereon "cancelled by mistake — orders not to pay:" and the bill was returned in this state to *D.* at the clearing-house before the settling hour. It is the usage in the trade in *London* so to cancel bills intended to be paid, and where a cancellation has occurred through mistake, to indicate the same by writing on the bill;

Held, that under these circumstances, no legal liability was cast upon *C.*, from which a promise could be inferred that he would pay the amount of the bill or return it without having cancelled or destroyed the acceptance;

That the duty cast upon *C.* was no more than to take due care of the bill, and if he did not choose to pay it, to return it uncancelled unless it had been cancelled by mistake, and in that case to indicate the same by writing on the bill;

That *C.* did use due care to prevent the acceptance from being defaced;

That the acceptance was an acceptance defaced and cancelled in point of fact, but that it was an acceptance cancelled by mistake.

Semble, that a banker who omits to return, or defaces, a bill is not, in all cases, under an obligation to pay the amount;

But *semble*, if he do so *wrongfully* he becomes liable to an action on the case if the holder has sustained damage by his breach of duty.

Held also, that under the circumstances above stated, *A.* could not sue *C.* for money had and received.

The facts having been found by a special verdict in the ordinary way:

Held, that the case was not within the 3 & 4 *W.* 4. *c.* 42. *s.* 24.:

Held also, that after special verdict, the pleadings could not be amended.

ASSUMPSIT. The first count of the declaration stated, that certain persons using the style or firm of *H. R.* and *S. Barker* and Co., before the making of the promise thereinafter next mentioned, to wit, on the 15th of *October* 1835, at *Smyrna*, in parts beyond the seas, made and drew their certain bill of exchange, directed to Mr. *Richard Jellicoe*, *London*, and thereby requested the said *R. J.*, at sixty-one days after sight thereof, to pay by that their first bill of exchange to the order of Mr. *Alexander Bargigli* the sum of 300*l.* sterling, value of the same; which bill the said *A.*

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rwards, to wit, on the day and year aforesaid, in-sed and delivered to a certain person in such in-sement mentioned, to wit, one *Vincent Bavertrelly*, afterwards, to wit, on the 21st of *October* in the aforesaid, indorsed and delivered the same to a ain person in such indorsement mentioned, to wit, *hael Badetty*, who afterwards, to wit, on the 17th one *November* in the year aforesaid, indorsed and delivered same to certain persons in such indorsement men-ed, to wit, *A. Hesse* and Co., who afterwards, to wit, the day and year last aforesaid, indorsed and de-red the same to a certain person in such indorsement itioned, to wit, one *Jonas Hagerman*, who afterwards, wit, on the 30th of *November* in the year aforesaid, orsed and delivered the same to certain persons in h indorsement mentioned, to wit, *B. L. Fould* and *lds Oppenheim*, who afterwards, to wit, on the day year last aforesaid, indorsed and delivered the same he plaintiff: that, after the making and drawing of said bill, to wit, on the 23d of *November* in the year esaid, the said *R. J.* duly accepted the said bill, and such acceptance, written upon the said bill, made the e payable at the banking-house of the defendants: t, after the said several indorsements, and after the l acceptance, when the said bill became due and able, according to the tenor and effect of the said and of the said acceptance thereof, to wit, on the h of *January* 1836, the said bill was duly presented l shewn to the defendants, at their said banking-house, payment thereof according to the tenor and effect of said acceptance, and the defendants were thereupon n requested by the plaintiff to pay him the same; l thereupon afterwards, to wit, on the day and year t aforesaid, in consideration that the plaintiff would liver the said bill to the defendants without receiving e sum of money expressed therein, at the time of such

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delivery, the defendants promised the plaintiff that they the defendants would, until they should have determined whether they would pay the sum of money in the said bill expressed or return the said bill to the plaintiff, use due care to prevent the said acceptance from being defaced or obliterated, and would, upon being requested so to do, in a reasonable time in that behalf, pay to the plaintiff the said sum of money or return the said bill to the plaintiff without having cancelled or destroyed the said acceptance. Averment: that the plaintiff, confiding in the said promise, did thereupon then deliver the said bill to the defendants without receiving, at the time of such delivery, the said sum of money expressed in the said bill, or any part thereof: yet the defendants did not nor would, after such delivery to them of the said bill, and before they had determined whether they would pay the said sum of money in the said bill expressed or return the said bill to the plaintiff, use due care to prevent the said acceptance from being defaced or obliterated; but, on the contrary thereof, the defendants, after such delivery, and before such determination, to wit, on the day and year last aforesaid, used so little care in that behalf, that the said acceptance, through the want of care of the defendants in that behalf, became and was defaced and obliterated: that afterwards, and in a reasonable time in that behalf, the plaintiff requested the defendants to pay to him the said sum of money expressed in the said bill, or to return the said bill to him the plaintiff, without having cancelled or destroyed the said acceptance; yet the defendants, further disregarding the said promise, did not nor would, when they were so requested as aforesaid, or at any other time, pay to the plaintiff the sum of money in the said bill expressed, or any part thereof; or return the said bill to the plaintiff without having cancelled or destroyed the same; but, on the contrary

thereof, the defendants on that occasion refused to pay to the plaintiff the said sum of money in the said bill expressed, and cancelled and destroyed the said acceptance, and returned the said bill to the plaintiff with the said acceptance so cancelled and destroyed; by reason of which premises, not only had the plaintiff lost and been deprived of the benefit of the said acceptance and of his recourse and remedies against the drawer and indorsers of the said bill respectively, but certain persons, to wit, *Heath*, *Furze*, and Co., to whom the said bill had been addressed in case of need by certain indorsers of the said bill through whom the plaintiff became such indorsee and holder thereof as aforesaid, to wit, the said *A. Hesse* and Co., and who, but for such defacing and obliterating of the said acceptance, would have taken up and paid the said bill for the honour of the said indorsers of the said bill, to wit, *A. Hesse* and Co., wholly refused to take up and pay the said bill, and the said bill and the said sum of money still remained wholly unpaid, due, and unsatisfied to the plaintiff.

There were also counts for money had and received, and upon an account stated.

The defendants pleaded, first, non assumpsit.

Secondly—to the first breach, in the first count—that they did, after the delivery to them of the said bill of exchange as in the declaration mentioned, and before and until they had determined whether they would pay the sum of money in the bill expressed or return the bill to the plaintiff, use due care to prevent the acceptance from being defaced or obliterated—concluding to the country.

Thirdly—to the same breach—that the acceptance did not become, nor was, defaced or obliterated, *modo et formâ*—concluding to the country.

Fourthly—to the last breach in the first count—that the defendants did return the bill to the plaintiff without

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having cancelled or destroyed the acceptance—concluding to the country.

Fifthly—as to so much of the breach in the first count of the declaration lastly assigned as imputed to the defendants that they cancelled the said acceptance, and returned the bill to the plaintiff with the acceptance cancelled—that the said promise in the said first count mentioned was made by the defendants to the plaintiff with and subject to a certain proviso, to wit, that, if they the defendants, after such delivery to them of the said bill as in the said first count mentioned, should, with a view to the payment of the said money therein mentioned, cancel the acceptance thereof, to wit, by drawing lines along and across the same, but without rendering the acceptance illegible, and afterwards, and before actually paying the said bill, and within a reasonable time for returning the said bill to the plaintiff unpaid, should discover that they had not funds or had not authority of or from the said *R. J.* to pay the said bill, or if such authority should, after such cancelling, and before such actual payment, and within such reasonable time as aforesaid, be revoked, that then in either of such cases the defendants should be allowed, within such reasonable time as aforesaid, to return the same bill to the plaintiff with the said acceptance in manner and form aforesaid cancelled, without paying or being required to pay the money in the said bill mentioned, they the said defendants first writing upon such bill that the said acceptance had been cancelled by mistake, or other words to the like effect: that, after the said bill had been so as aforesaid delivered to the defendants by the plaintiff, to wit, on the said 26th of *January* 1836, they, the defendants, with a view to the payment of the said sum of money in the said bill mentioned, did cancel the said acceptance, to wit, by drawing lines along and across the same, but without rendering the

said acceptance illegible; and that afterwards, and before actually paying the said bill, and within a reasonable time for returning the said bill to the plaintiff unpaid, to wit, on the day and year aforesaid, the authority theretofore given them by the said *R. J.* to pay the said bill was revoked by the said *R. J.*; whereupon they the defendants did thereupon, afterwards, and within such reasonable time as aforesaid, and when they were so requested by the plaintiff as in the said first count mentioned, return the said bill to the plaintiff with the said acceptance in manner and form aforesaid, and in no other way whatever, cancelled, and without paying the same, they the defendants having first, to wit, on the day and year last aforesaid, written upon the said bill that the said acceptance thereof had been so as aforesaid cancelled by mistake, as it was lawful for them to do for the cause aforesaid. — Verification.

The plaintiff joined issue on the first four pleas, and replied *de injuriâ* to the last.

At the trial, before *Tindal* C. J., at the sittings for *London* after *Trinity* term, 1838, a special verdict was found, which stated as follows: —

The bill of exchange in the first count mentioned was drawn, indorsed, and accepted as in that count mentioned, and the drawers and indorsers of the said bill in that count mentioned, at the time the same was so drawn and indorsed as aforesaid, were, respectively, merchants residing in parts beyond the seas: and at the time the said *A. Hesse* and Co. indorsed the said bill, as in that count mentioned, the said *A. Hesse* and Co. addressed the said bill, in case of need, to "Messrs. *Heath*, *Furze*, and Co.," as in that count mentioned.

On the 4th of *December* 1835 the plaintiff discounted the said bill, with others, amounting altogether to the sum of 10,000*l.* or thereabouts, with Messrs. *Overend*, *Gurney*, and Co., bill-brokers in

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London. On the 26th of *January* 1836 the said bill became due, and, being then in the hands of Messrs. *Barclay* and Co., of the city of *London*, as bankers for the plaintiff, was, about eleven o'clock in the morning of that day, taken by a clerk of Messrs. *Barclay* and Co. to the clearing-house, and there presented to a clerk of the defendants for payment according to the practice of *London* bankers as thereinafter mentioned, that is to say, by his putting the same into the drawer belonging to the defendants at the said clearing-house; and that the said bill was thereupon taken by the said clerk of the defendants from their said drawer to their banking-house in the said city, that the defendants might determine whether they would pay the same. During the whole of the day of the 26th of *January* 1836, the said *R. J.* had unincumbered funds in the hands of the defendants, sufficient in amount to pay the said bill. The said bill being so taken to the defendants' banking-house, they examined the same, and cancelled the acceptance upon the said bill about half-past eleven in the morning of the same day, by drawing lines along and across the same in the form usual amongst *London* bankers when they pay or intend to pay bills made payable at their house; and the said bill was entered by a clerk of the defendants in manner following: —"*R. Jellicoe* 300*l.*," — in a book called "The paid-clearing-book," kept by them for the purpose of entering therein bills and cheques brought from the clearing-house paid or intended to be paid by the said bankers, and which said entries are made that the bankers may know the general amount paid at the clearing-house in the course of the day: according to the course of business in the defendants' said banking-house, the entries made in the last-mentioned book are shortly afterwards, in the course of the same day, transferred into a book of the defendants called "The ledger," to the debit of

arties on whose account the bills or cheques there-
erred to are paid by the defendants; and the said
so made in the said paid-olearing-book was not
transferred into the said ledger of the defendants.

consequence of letters received from abroad at
past nine in the morning of that day, the said *R. J.*
ıe 26th of *January*, about twelve o'clock in the day,
ıed with some friends, and afterwards with his
itor, and determined to stop payment, and did in
on and from that day stop payment, and shortly
wards became bankrupt, and a *fiat* in bankruptcy
issued against him; and, having so determined to
payment, the said *R. J.* knowing that the said bill
xchange fell due on the said 26th of *January*, went
ıe banking-house of the defendants about half-past
ve o'clock on that day, and then ordered them not
ay any bills on his account; and on that occasion
said bill so cancelled as aforesaid was shewn to the
R. J. The defendants, having received such orders
foresaid, soon afterwards wrote upon the said bill
words "cancelled by mistake—orders not to pay;"
the said bill was afterwards, at three o'clock of the
e day, taken by one of their clerks to the clearing-
se, and by him deposited in a drawer belonging to
said Messrs. *Barclay* and Co., having at the time
said words "cancelled by mistake — orders not to
" written thereon; and the same was so as aforesaid
ıght back and deposited within the usual time at
:h bills or cheques are brought back and deposited at
clearing-house when bankers refuse to pay them. The
ring clerk of the said Messrs. *Barclay* and Co., on
ng the said bill so returned with such cancellation, and
ı words written thereon as aforesaid, applied to his
cipals, the said Messrs. *Barclay* and Co., to know
t he was to do, and they, after some hesitation, an-
red they supposed they must keep the bill; and the

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bill was accordingly retained by the Messrs. *Barclay* and Co., and taken into the account between them and the defendants, on striking the day's balance, as thereinafter mentioned.

The clearing-house above referred to is a room situate in the city of *London*, generally used by the bankers of *London* and *Westminster* for the purpose of facilitating the receipts and payments between themselves. The manner of presenting and receiving and passing bills, notes and cheques at the clearing-house, is as follows: — The clerks from the different banking-houses using the clearing-house, assemble there daily at eleven o'clock in the forenoon, and remain, or go backwards and forwards, as the case may be, until half-past five, when the clearing-house is closed. Each banker has a separate drawer, into which drawer all bills, notes, and cheques then due, and which are payable at such banker's, are put by the other respective bankers' clerks holding the same, on arrival, at eleven o'clock, and so from time to time through the day. Up to four o'clock (but not later), bills, notes and cheques are put into the drawer as they arrive. Shortly after eleven o'clock, the clearing clerk of each banker takes out of his drawer all the bills, notes and cheques which have been then put into it by other bankers' clerks claiming payment, and takes or sends the same to his principal's banking-house, in order that the banker may examine them and determine as to the payment of them respectively; and the same course is pursued again at three o'clock in the afternoon, and from time to time afterwards during the remainder of the day until four o'clock. Each banker examines the bills and cheques so sent or taken to him by their respective clerks, and the customers' accounts to which they refer; and such bills or cheques as are at the time intended to be paid, are cancelled by drawing lines along and across the name of the party for whom

such payment is intended to be made. Such of the bills and cheques as the bankers determine not to pay, are returned by them to and deposited in the drawer at the clearing-house of the bankers by whom the same were that morning brought to the clearing-house. Sometimes this is done when the clerk returns at three o'clock to the clearing-house, and sometimes the bankers (if they so please) retain them until three minutes before five o'clock, and then return and deposit them in the said drawer: and all bills not so returned and deposited by the last-mentioned time are considered by the respective bankers as paid, the claims of the several bankers on each other being settled at five o'clock, and the final balance between them then struck; though each banker's clerk makes up his account from time to time during the day, as may suit his convenience, until five o'clock, correcting it by the addition of such subsequent receipts and payments as may be necessary according to the items which afterwards come in. When a cancellation has occurred through error or mistake, the same has been indicated in writing on the bill, note or cheque returned.

Upon taking the account between Messrs. *Barclay* and Co. and the defendants at the clearing-house at five o'clock in the afternoon of the 26th of *January* 1836, of the claims on each other through the clearing-house on that day, there was a balance due from Messrs. *Barclay* and Co. to the defendants, which amounted, after disallowing Messrs. *Barclay* and Co. credit for the amount of the said bill in the first count mentioned, to the sum of 629*l.* 7*s.* 10*d.*, and on allowing to them the said bill as a credit, amounted to 329*l.* 7*s.* 10*d.*; and on the settlement of the said account at half-past five on the same afternoon between Messrs. *Barclay* and Co. and the defendants at the clearing-house, the amount due to the defendants was taken as 629*l.* 7*s.* 10*d.*,

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and was then paid by Messrs. *Barclay* and Co. to defendants; and the said bill was retained by Mes *Barclay* and Co. with the acceptance of the said *J.* thereon cancelled, and the words "cancelled mistake—orders not to pay," written thereon by defendants.

On the 27th of *January* 1836, the said bill wa turned to the plaintiff, who paid to *Overend, Gu* and Co. the amount thereof.

On the said 27th of *January* 1836, the plaintiff presented the said bill to the defendants at their b ing-house for payment thereof, and demanded payı of the same, when the defendants refused to pay same, and declared to the plaintiff that they made refusal by the order of the said *R. J.*, and that should keep the funds of the said *R. J.* in their hı until any question about the said bill was disposed and thereupon the plaintiff caused the said bill to protested for nonpayment thereof.

On the said 27th of *January* 1836, the plaintiff p sented the said bill to Messrs. *Heath, Furze* and (for payment thereof; but the said Messrs. *Heath, Fu* and Co., who were correspondents of the said *A. H* and Co., and to whom reference had been made on said bill in case of need, and who were authorised, the indication on the said bill, to pay the same, refu to pay it, stating, at the time, the said cancellation of acceptance as the reason for their so refusing to p and thereupon the plaintiff caused the said bill to again protested for nonpayment thereof: and *John Heath*, one of the partners in the said house of *Hea Furze* and Co., was called as a witness on the part the plaintiff on the trial, and swore that his firm wo have paid the bill provided the acceptance had not b cancelled.

It is entirely optional with a party to whom a bil

referred in case of need, whether he will or will not pay the same for the honour of the party making such reference; and parties to whom reference is so made do not usually pay the bill if they have any doubt at all as to the regularity of the proceedings.

On the said 27th of *January* 1836, the plaintiff gave the defendants notice of such refusal to pay by the said Messrs. *Heath, Furze* and Co., and that the said bill would be returned under protest by that night's post to *Paris*, and that the defendants would be held responsible for all damages and consequences arising from the cancellation of the acceptance of the said *R. J.* as aforesaid.

On the said 27th of *January* 1836, the plaintiff returned the bill by post, under protest, to Messrs. *B. L. Fould*, and *Foulds Oppenheim*, at *Paris*; and, in due course of post, the said Messrs. *B. L. Fould*, and *Foulds Oppenheim*, returned the bill to the plaintiff unpaid, and refused to pay the same; and stated that they did so on account of the said cancellation, and that it would be impossible for them to recover the amount of the said bill from the prior indorsers or drawers, in consequence of such cancellation as aforesaid.

On the said 26th of *January* 1836, between the hours of two and three o'clock in the afternoon, the said *R. J.* wishing to pay back to a correspondent a sum of 500*l.* which that correspondent had remitted to him a few days before, for the purpose of taking up a bill upon which that correspondent was liable, and which was to fall due on the 2d or 3rd of *February* following, carried a certain bill of exchange for the sum of 500*l.* to the banking-house of the defendants, and applied to them to discount the same for him, which they consented to do, and in fact did, in manner following, that is to say, the said *R. J.* indorsed the last-mentioned bill, and handed it to the defendants, and, at the same time, drew a cheque upon them across the counter for the like sum

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of 500*l.* The defendants then and there cancelled the said cheque, and paid the sum of 500*l.* to the said *R. J.*, and at the same time the defendants credited the account of the said *R. J.* with the sum of 500*l.* being the amount of the said bill, and debited the same account with the like sum of 500*l.*, and also with the sum of 3*l.* 2*s.* 6*d.* for the discount of the said bill.

Foreign indorsers of bills are in the habit of refusing to pay where the acceptance of a bill indorsed by them has been cancelled; but, whether such foreign indorsers are or are not, by the law of *France*, compellable to pay where the acceptance of a bill indorsed by them has been cancelled in manner and form as the acceptance of the said bill in the first count mentioned was so as aforesaid cancelled, the jurors know not, nor can they say.

When bills of exchange are paid, or intended to be paid, by bankers, it is the custom and practice for such bankers, to cancel the acceptance in the manner in which the said bill of exchange in the first count mentioned was cancelled.

The defendants have ever since retained, and now hold, the amount of the said bill in their hands, in order (if they can) to pay the said bill in the event of a judgment being recovered against them.

The special verdict then left it, in the usual terms, to the court to determine for which party the finding upon the issues should be entered; and the damages of the plaintiff were contingently assessed at 345*l.*

The point marked for argument on the part of the plaintiff, was as follows:

"That the defendants by the cancellation of the acceptance of the said *R. J.* on the said bill of exchange in this special verdict mentioned, in the manner and under the circumstances therein stated, became liable to pay to the plaintiff the said sum of 300*l.* in the said

bill mentioned, with interest at 5 per cent., or damages for such cancellation equal to that amount."

The points on the part of the defendants were, —

"First. That from the facts stated in the special verdict, the law will not imply any such unqualified promise to have been made by the defendants as that stated in the special count of the declaration, viz. that they would either pay the money in the bill mentioned, or return the bill to the plaintiff without having cancelled or destroyed the acceptance: and that the defendants were therefore entitled to the judgment of the court on the plea of non assumpsit.

"Secondly. That the facts stated in the special verdict did not shew that the acceptance became defaced or obliterated or cancelled or destroyed, within the meaning of those terms as used in the declaration; still less did they shew that they became so (if at all) through the defendants' failing to use due care to prevent the acceptance from becoming defaced or obliterated; and that, consequently, the defendants were entitled to judgment on the second, third, and fourth pleas.

"Thirdly. That the true nature of the contract, to be implied from the facts as found by the jury, was that set forth in the fifth plea; and that the allegations therein contained were justified by the finding of the jury, so as to entitle the defendants to the judgment of the court on the replication to the said fifth plea.

"Lastly. The defendants will insist, generally, that, by the law of *England*, a banker, at whose house a bill is made payable by the acceptor, being a customer of such banker, comes under no irrevocable liability, by cancelling the acceptance in manner stated in the special verdict, to pay such bill; but that under the circumstances stated in the special verdict, the banker, notwithstanding such cancellation, is justified, by the law of *England*, in returning the bill unpaid to the persons

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presenting the same at maturity, if, before those pe sons call for the same, or have notice of such cancellatio the acceptor has enjoined the banker not to pay it, su banker in that case, intimating, on the face of the bi that the acceptance has been cancelled by mistak and, if it be necessary to discuss the question, the d fendants will contend that such is also the law of forei countries."

The case was argued in last *Trinity* Term. (*a*)

Manning Serjt. (with whom was Sir *John Bayley*) the plaintiff. All that the plaintiff has to shew in or to be intitled to judgment is, that the promise alleged have been made by the defendants is to be implied fr the facts of the case, a breach of such promise on th part, and that *some* damage has resulted therefrom the plaintiff. The *amount* of damage is not in questio though the jury have found that if he is entitled to r cover at all, he is entitled to the whole amount of th bill. [*Maule* J. If the fifth plea is proved the verdi must be entered for the defendants upon that plea, ar also upon the general issue.] That would be so, as th fifth plea amounts to *non assumpsit*, and would have be bad on demurrer. It alleges, in effect, that when a ca cellation is made upon a bill by error or mistake, a certa course is to be taken, and that the promise made by th defendants was a conditional one, — to follow that cours — and not absolute, as stated in the declaration. Th facts as found by the special verdict shew that this w not the case of a cancellation by mistake, and therefo it does not fall within the usage found. At the time th cancellation was made, the acceptor had not revoke the authority of the defendants to pay the bill, nor h he even made up his own mind not to pay it. In *Ma*

(*a*) *June* 3d. Before *Tindal* C. J., *Coltman*, *Maule*, a *Cresswell* JJ.

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zetti v. *Williams* (*a*) it was held that a customer might maintain an action against a banker who had received sufficient funds, for refusing to pay his cheque;—even although the customer had not sustained actual damage. So, in this case, the acceptor might have sued the defendants if they had in the first instance refused to pay the bill. [*Tindal* C. J. An action might have lain if they had sent back the bill to the clearing-house uncancelled; but not if they had kept it lying on their counter up to the time when they first knew his intention to stop payment. *Maule* J. The question is, whether the acceptance was cancelled by mistake.] It is submitted that it was not. The acceptance was cancelled intentionally and with full knowledge. *Novelli* v. *Rossi* (*b*) will be relied upon by the other side. It was there held that where an acceptance is cancelled by mistake, and the mistake is immediately discovered, and an explanation is written on the face of the bill, the rights and liabilities of the parties remain as before. But there the cancellation was clearly made by mistake, at the time the bill was presented, under an impression that the bankers had funds of the acceptor at the time in their hands. In this case there was clearly no mistake as to any fact at the time of cancellation. Besides, in *Novelli* v. *Rossi* the action was between parties to the bill; and the question was, whether the holder was precluded from enforcing the bill; for he was in the same situation as if he were suing upon it. And it was held that the holder would be entitled to recover against the indorser if the cancellation had not the effect of destroying the bill. But that is very different from the question in this case. It is sufficient here for the plaintiff to shew that he is in a worse situation by the cancellation. Where any alteration is apparent on the face of a

(*a*) 1 *B. & Ad.* 415. more full, 9 *Law Journal, Rep.*
(*b*) 2 *B. & Ad.* 757. *S. C.* *K. B.* 307.

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negotiable instrument, the *onus* is thrown upon the holder to shew the circumstances under which the alteration was made; *Henman* v. *Dickinson* (*a*). A greater burden of proof is consequently thrown upon the plaintiff, which might be too heavy to be borne. He might be unable to prove the circumstances under which the cancellation took place. The witness to the transaction might be dead. In *Novelli* v. *Rossi* no point was raised as to the altered condition of the parties. It was assumed that if the right of action against the acceptor was not gone, that would be sufficient; without considering how that right might be affected as to the burden of proof. Assuming, then, that the cancellation in this case did not amount to a legal destruction of the document, still the plaintiff's course of proceeding against prior parties would be altered; and that is sufficient damage to give him a right of action. If the cancellation in question had been made with the consent of the holder, his remedy against prior parties would have been gone. [*Maule* J. Is that quite clear?] If the cancellation were without payment. [*Maule* J. It does not appear to have been so held in *Novelli* v. *Rossi*.] Perhaps the position may be stated somewhat too strongly; but it is clear that the situation of the holder would have been materially altered as to the burden of proof. [*Maule* J. Suppose the bill had been defaced by unavoidable accident while it was in the hand of the banker, would the action have lain?] It is submitted that it would, upon the present form of declaration and the plea of *non assumpsit*. [*Tindal* C. J. Suppose there had been several bills lying on the counter at the same time, and a clerk, intending to cancel another bill, had by mistake cancelled the one in question.] Still that would have been negligence; and the declaration

(*a*) 5 *Bingh.* 183.; 2 *M.* & *P.* 289.

lleges a promise that the defendants would use due ıre to prevent the acceptance from being defaced or ɔliterated. [*Maule* J. The promise as to taking care to revent the bill from being defaced might be struck out; ıere would then remain an allegation of a promise to ay the bill, or return it with the acceptance uncancelled.] ınd that would be sufficient; as if a promise were made o pay 100*l.* at *York* or 1000*l.* somewhere else, at the lection of the promisee, and he elected to receive the 100*l.* at *York*, the promisor would be liable for that sum, hough not for the 1000*l.* So here, assuming that the laintiff consented to have the bill returned to him, the efendants were bound to return it without having can-lled the acceptance. If, as suggested, the cancellation d been made merely by the manual act of the de-ndants without any intention on their part, it might haps not have been sufficient to support the declara-. [*Maule* J. It appears to me that you must go length of contending that *Novelli* v. *Rossi* is not law.] ssibly that decision ought to be received with some ns of allowance. In *Master* v. *Miller* (*a*) it was held t an alteration of the date of a bill of exchange, after ptance, whereby the payment would be accelerated, ds the instrument, and that no action can be after-ds brought upon it, even by an innocent holder for aluable consideration. The necessity of preserving otiable instruments in an unaltered state is strongly mented upon in that case. [*Maule* J. There is no ception in the promise here, not to cancel the accept-e without the consent of the plaintiff.] It was not essary. *Exceptio eorum quæ tacitè insunt nihil ope-ri.* It is not like the case of an assault where a per-ission to beat the plaintiff would be no defence to an tion. [*Maule* J. There seems to me to be great diffi-

(*a*) 4 *T. R.* 320. *S. C.* affirmed on error, 2 *H. Bl.* 140.

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culty in converting a duty into an implied promise.] If the promise is somewhat inaccurately stated, still the plaintiff might have judgment, as the case is within the operation of the 3 & 4 *W.* 4. *c.* 42. *s.* 24., whereby a judge, instead of directing an amendment in the record, is authorised to have the special facts found by the verdict, and the court then are to give judgment "according to the very right and justice of the case." Or the court might amend the declaration at common law, independently of the statute. [*Tindal* C. J. Not after special verdict. To amend would be to give a new ground of action, and that would have to be submitted to a new jury.] The promise as alleged must be understood to mean that the defendants would not cancel the bill in such a way as to render it less available than it was before. [*Tindal* C. J. The second plea goes to the first breach: the fourth plea to the second breach: the third plea alleges that the defendants did use due care to prevent the acceptance from being defaced or obliterated. Now the facts are that the acceptance was cancelled when the bill was taken to the defendants, the acceptor then having funds in their hands, and the defendants intending to pay the bill,—but in the course of the day they receive instructions from the acceptor not to pay it. Was that a want of ordinary care on their part? How could they tell that the acceptor would come in and order them not to pay the bill?] Assuming the acceptor to have had the option to revoke the acceptance, the defendants ought not to have cancelled the acceptance before such option had been exercised. [*Tindal* C. J. Suppose the defendants had fifty bills presented to them in the course of the day; the cancellation could not be put off till the last moment. Some reasonable time must be allowed to them. Then the question is whether this bill was cancelled in an unreasonable time. The fourth plea says that the defendants returned the bill without having

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cancelled or destroyed the acceptance; and upon that the question will be whether what took place amounted to a cancellation by the law of *England*.] The cancellation destroys the bill *pro tanto;* and, at any rate, encumbers the plaintiff with the burden of additional proof; and, under some circumstances, it might destroy his right of action altogether. If the acceptance remains to all intents and purposes as available as before, it must be admitted that there was no legal cancellation. But that is not the effect of the alteration. The plaintiff has clearly sustained *some* damage. It is expressly found by the special verdict that foreign indorsers of bills are in the habit of refusing to pay where the acceptance of a bill indorsed by them has been cancelled. It does not indeed appear whether such foreign indorsers are or are not by the law of *France*, *compellable* to pay in such a case; but it may be presumed that they are not compellable, as they do not pay; and that if they refuse, they refuse lawfully.

At any rate the plaintiff is entitled to recover under the count for money had and received. In *F. N. B.* 121 F. it is said, "If a man have a patent from the King to have a certain sum for term of years, or for life, out of the customs of *London*, and thereupon he have a liberate to the customer to pay him, which he delivereth to the customer, at which time the customer hath enough in his hands to pay him; now by the delivery of the liberate, and the assets in the hands of the customer, the customer is debtor unto him, and he shall upon this matter have debt against him." [*Maule* J. There are later authorities upon the subject. In *De Bernales* v. *Fuller* (*a*), where money was paid into a banking house for the purpose of taking up a particular bill, which was lying there for payment, it was held

(*a*) 14 *East*, 590. n. (and see *ibid.* p. 598. in the judgment). *S. C.* not *S. P.* 2 *Campb.* 426.

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to be money had and received to the use of the the owner and holder of the bill, and that it could not be applied by the bankers to the general account of the acceptor who paid in the money; though the banker's clerk had said at the time the money was paid in, that he could not give up the bill till he had seen his master. But that decision turned upon the fact that the money having been expressly paid in to the defendant's house for the specific purpose, declared at the time, of taking up that particular bill; and that purpose not having been directly repudiated till afterwards, it must be taken to have been received at the time for the use of the holder of the bill. But the principle of that case would appear to be rather against you. *Cresswell* J. In the passage cited from *F. N. B.*, it appears that the liberate was *delivered* to the party.] The defendants having assets of the acceptor's in their hands, and the acceptance being made payable at their bank, they became debtors to the holder of the bill. The making the acceptance so payable was a mandate or order to them to pay the money, which would operate in the same way as the delivery of the liberate in the instance cited. But the plaintiff here may go further; for the defendants have, by cancelling the acceptance, done an act which not only amounts to an assent on their part to the order from the acceptor, but which also disables them from putting the plaintiff in the same situation he was in before.

As to the form of the promise — assuming that the second alternative is not correctly set forth, it might be rejected as immaterial. If *A.* promises to do a thing absolutely, and the promisee alleges that the promise was to do that thing and also another which is immaterial, it is of no consequence; and if the promisee shews that *A.* did promise to do that thing, and proves a breach of such promise, he supports his allegation. [*Maule* J. Is

o?] He proves all that is material. But at any the words in the declaration — "or return the ill to the plaintiff *without having cancelled or de- d the acceptance*," may be read thus — "or return id bill to the plaintiff, *without having done any act ncellation that should prejudice the rights of the iff:* — and if that were so, a breach has been d, because the plaintiff's rights have been pre- d.

lfourd Serjt. (with whom was *F. Robinson*) for the dants. There is no statement in the declaration he defendants had funds belonging to the acceptor ir hands. The promise alleged is, therefore, not sistent with their having no funds. And it amounts y to a promise that they will either pay the bill, turn it with the acceptance uncancelled. It im- , therefore, an absolute promise without reference e state of the accounts between the acceptor and lefendants, that if they were unable to return the from whatever cause, they would pay it. It is not ternative promise, but an absolute promise to do thing or another. Even apart from the usage l in the special verdict, there is no ground for con- ng that any such obligation, as would give rise to nplied promise as alleged, would result from the of facts alleged in the declaration. [*Maule* J. The ise is not quite as you state it — it is, that the de- nts will pay the amount of the bill, or return the " without *having cancelled or destroyed* the accept- " That would mean that the acceptance was not cancelled by any act of theirs.] At any rate, the tiff now contends that the defendants would be d if they had cancelled the acceptance by the st accident. But that cannot be so. No legal dy in that case would be lost to the holder. At

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the most a trifling inconvenience to him would have arisen. So, if the bill had been accidentally burnt, there would have been inconvenience no doubt to the plaintiff; but his remedy in respect of the bill would not have been destroyed. So, if the bill had been altered by a stranger. (*a*) In *Master* v. *Miller* the alteration was made, though it did not appear by whom, while the bill was in the possession of a prior indorser, through whom the plaintiff claimed.

At all events the contract is laid too widely. There may possibly be a duty on the part of the defendants not to deface the bill, which may give rise to an implied contract to the same extent; but there is no duty to pay the amount of the bill.

The practice among bankers in *London*, as stated in the fifth plea, is borne out by the special verdict. If the plaintiff had presented the bill himself at the defendant's, it would have been paid at once; but as he chose to present it through his bankers, all the known usages of bankers must be taken as imparted into the transaction. *In hæc fœdera venit.* And it appears that the cancellation in question took place in the ordinary course of proceedings. The plaintiff was therefore bound, under the circumstances, by the practice in the city; as where a bill is made payable at a banker's, it must be presented within banking hours; though it is different where the bill is payable at a private house; *Wilkins* v. *Jadis* (*b*), *Elford* v. *Teed* (*c*), *Parker* v. *Gordon.* (*d*) The usage as to the clearing-house, as found by the special verdict, is this — that the cancellation of an acceptance denotes the *intention* of the bankers to

(*a*) See *Lord D'Arcy's Case*, 1 *Lev.* 282.; *Waugh* v. *Bussell*, 5 *Taunt.* 707.; *Henfree* v. *Bromley*, 6 *East*, 309.; *Irvine* v. *Elmor*, 8 *East*, 54.; *French* v. *Patten*, 9 *East*, 355.

(*b*) 2 *B. & Ad.* 188.

(*c*) 1 *M. & S.* 28.

(*d*) 7 *East*, 385.

ill; but that such intention may be revoked ttling at the close of the day. It may often antage to an acceptor that matters should thus *fieri*, as he may thereby be enabled to pay nto his banker's in the course of the day to ptances which would otherwise have been dis-

In *Fernandey* v. *Glynn* (*a*) it was held, that, ge of trade in *London*, a cheque may be re- the banker, on whom it is drawn, till five in oon of the day on which it is presented for and then returned, although it has been pre- ancelled by mistake. [*Tindal* C. J. There ı distinction between a cheque and a bill of

Maule J. There may be several parties to In *Cox* v. *Troy* (*b*), where a drawee, having ten his acceptance upon a bill with the inten- cepting it, afterwards changed his mind, and was communicated to the holder, or the bill ered back to him, obliterated his acceptance, d that the drawee was not bound as acceptor. esent case it may be admitted, that if the in- ad been discharged by the cancellation, the uld have lain. [*Tindal* C. J. The plaintiff that at any rate he has suffered some damage e by reason of the further proof imposed upon action against the previous parties to the bill.] e difficulty would have arisen in *Cox* v. *Troy*, tion against the drawer; or in *Wilkinson* v. :), where certain bills of exchange, purporting mongst others, the indorsement of *H.* and Co., *Manchester*, were presented for payment in at a house where the acceptance appointed be paid. Payment being refused, the notary

ampb. 426. n. *S. C.* *Fernandez* v. *Glynn*, 438.

(*b*) 5 *B.* & *A.* 474.

(*c*) 3 *B.* & *C.* 428.; 5 *D.* & *R.* 403.

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who presented them took them to the plaintiff, the *London* correspondent of *H.* and Co., and asked him to take up the bills for their honour. He did so, and struck out the indorsements subsequent to that of *H.* and Co. and the money was paid over to the defendants, the holders of the bills. The same morning it was discovered that the bills were not genuine, and that the names of the drawers, acceptors, and *H.* and Co., were forgeries. The plaintiff immediately sent notice to the defendant, and demanded to have the money repaid. This notice was given in time for the post, so that notice of the dishonour could be sent the same day to the indorsers: and it was held, that the plaintiff, having paid the money through a mistake, was entitled to recover it back, the mistake having been discovered before the defendants had lost their remedy against the prior indorsers; and that the rights of the parties were not altered by the erasure of the indorsements, that having been done by mistake, and being capable of explanation by evidence. *Abbott* C. J., in giving the judgment of the court in that case, citing *Fernandey* v. *Glynn*, observed — "Now this case shews, that the act of drawing a pen through a name in such instruments, is not considered among mercantile men to be an act so absolute in itself as not to be recalled and annulled, if done by mistake. We think that, in the present case, the mistake may be shewn, and that the indorsers are not discharged. If, indeed, it shall hereafter appear that the defendants are put to any additional expense, by extra proof or otherwise, on account of this improvident act of the plaintiff, which is very unlikely, they may possibly maintain a special action upon the case to recover a compensation to the extent of the injury they sustain; but this does not necessarily extend to the whole consideration, and if not, it furnishes no defence to the present action." These cases are authorities to shew that

neither this special assumpsit, nor an action for money had and received, will lie under the circumstances of the present case. There was no contract at all between the plaintiff and defendants—certainly none of the kind alleged. There was no privity between them. The defendants throughout have acted according to the known usage of the trade among bankers. They had a right to change their mind, and destroy the symbols of their intention to pay the bill. They did not debit their customer, the acceptor, with the amount of the bill; and therefore never appropriated the money so as to be holders of it to the plaintiff's use. This distinguishes the present case from that cited from *F. N. B.*, where there was an act of appropriation by handing over the liberate. Suppose the defendants, after the cancellation of the acceptance, had actually paid other bills or cheques of *Jellicoe*'s with his money, and it was found before the settling, that he had overdrawn his account; could it be contended that they were liable to the plaintiff for money had and received? In *Stewart* v. *Fry* (*a*), an acceptor of a bill payable at his *London* bankers', remitted them funds to pay it, or to take it up if overdue; which last being the case, the bankers, who were bankers in *London*, called on the holders, intending to take it up; but finding the bill was sent back to *Ireland* as dishonoured, they remitted the money back to the acceptor, and upon a subsequent presentment of the bill, refused payment; and it was held that this was not such a specific appropriation of the money, as to render the bankers liable to the holders for the amount remitted. That case is an authority to shew that even the application of money may be revoked.

Upon the first point, therefore, it is submitted that no such promise as is alleged in the declaration, arises

(*a*) 7 *Taunt.* 339.

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from the facts therein stated. This is independent of the special circumstances stated in the fifth plea and found by the special verdict; and even if a promise might be implied from the general facts, there could be none under these special circumstances. *Novelli* v. *Rossi* is a strong authority for the defendants. The alteration in the situation of the parties was referred to in the argument in that case.

The second plea, which alleges that the defendants did use due care to prevent the acceptance from being defaced or obliterated, is supported by the facts of the case. For the defendants, in acting in the ordinary course of business, and adding the words on the bill, "cancelled by mistake, orders not to pay," did exercise every care that could reasonably be expected of them.

The fourth plea, which alleges that the defendants did return the bill without having cancelled or destroyed the acceptance, is also supported. What was done to the bill did not amount to a cancellation in law — there was no *animus cancellandi* on the part of the defendants. If an issue were joined whether or not a *will* had been cancelled, and it were shewn that the testator had drawn his pen across it without any intention to revoke it, it would be found to be no cancellation.

It is clear there is no ground for the amendment suggested. [*Tindal* C. J. It would entirely vary the measure of damages and the situation of the parties.]

Manning Serjt. in reply. The second breach alleged in the declaration is, that the defendants would not pay the amount of the bill, or return the bill without having cancelled or destroyed the same, but, on the contrary, cancelled and destroyed the acceptance, and returned the bill with the acceptance so cancelled and destroyed. [*Maule* J. The term *cancelling*, as used in the declar-

tion, seems to mean *invalidating* the bill.] If that were so, there would be no meaning to be attributed to the word *destroying*. The cancellation purports *primâ facie* that the bill has been paid; and, therefore, a bill, the acceptance of which has been cancelled, cannot be sued upon without an explanation of the circumstances under which the cancellation took place. The rights of the parties have therefore been altered by the cancellation. A banker is not a servant or agent of his customer, but a debtor; and in this case there had been a transfer of the debt. [*Maule* J. The arrangement as to the clearing-house is for the convenience of both parties. Suppose the plaintiff had himself presented the bill at the defendants' counting-house and they had torn it, would that have given rise to a contract?] It would be more like the present case to suppose that when the plaintiff brought the bill to the defendant's counting-house, one of them had said, "I must shew this bill to my partner;" and had taken it into a back room, and had then brought it back torn or cancelled; and it is submitted that such a state of circumstances would give rise to an implied contract. In *Fernandey* v. *Glynn* it clearly appeared that no rights of any third parties would be injured. So, in *Cox* v. *Troy*, the remedy against the drawer of the cheque would remain the same. [*Maule* J. The holder of the cheque would be exactly in the same difficulty as to evidence, as the plaintiff in the present case.] The point was not raised in that case; but clearly no third party was concerned. In *Novelli* v. *Rossi* also no question was raised as to the increased difficulty in the proof. The only point taken was, as to the difference effected in the situation of the partners by the decision of the *French* court. Indeed, the point could not have been raised, as the *French* court had decided that the parties were discharged from liability on the bill. The latter part of the judgment in *Wilkin-*

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son v. *Johnston* is in favour of the plaintiff. *Abbott* C. suggests, and the suggestion has been adopted in the course of the present argument, that a special action on the case might lie to recover compensation to the extent of the injury sustained by an improvident cancellation. Perhaps the plaintiff here might have sued in tort; but he may waive the tort and bring *assumpsit;* as in the case of actions against carriers, who may be either sued in *case* upon their common law duty, or in *assumpsit* upon the implied contract arising out of such duty. [*Maule* J. Suppose the acceptor had paid the bill in the course of the day, could you have still brought your action against the defendants? You might have done so, if this is a contract. If the action were in tort the case would be quite simple, because no damage could be shewn.] The payment by the acceptor would have been a satisfaction of the contract; it would have enured as a payment by an agent of the defendants. If *A.*'s goods are distrained for rent on a tenant's premises, the rent is thereby satisfied. It does not signify from what party the satisfaction comes. [*Maule* J. Could you say that in such a case of payment there had been *accord* and satisfaction?] The argument need not go that length. It is sufficient that there would have been a payment, and thus one alternative of the promise would have been satisfied. [*Cresswell* J. When you speak of the *rights* of the parties having been altered, you mean their *position.*] There is no substantial difference between the rights of the parties and their means of enforcing them.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court, as follows: — This is an action of special assumpsit. The declaration states, that *H. R.* and *S. Barker* and Co. drew a bill of exchange upon *Richard Jellicoe* for 300*l.*, payable, sixty-one days after sight, to the order

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exander Bargigli; that it was indorsed by him and veral others successively, the last of whom, *B. L.* *l* and *Foulds Oppenheim*, indorsed to the plaintiff; the drawee, *Richard Jellicoe*, on the 23d of *No-er* 1835, accepted the bill, by writing upon it and ng it payable at the banking-house of the de-ants. The declaration further states, that, when the became due, on the 26th of *January* 1836, it was presented for payment to the defendants at their ing-house, and that the defendants, in consideration the plaintiff would deliver the bill to them without iving payment at the time of the delivery, promised plaintiff that, until they should have determined ther they would pay the bill or return it, they would due care to prevent the acceptance from being de-d or obliterated, and would, upon being requested reasonable time, pay the plaintiff the amount of the or return it without having cancelled or destroyed acceptance. The declaration then goes on to state the defendants did not use due care, but that ugh their want of care the acceptance became de-d and obliterated; that the plaintiff requested the ndants to pay the bill or return it with the accept-uncancelled, but the defendants would not pay the ey, and returned the bill with the acceptance can-d and destroyed; by reason whereof the plaintiff lost the benefit of the acceptance, and his remedies nst the drawers and indorsers; and also that certain ons to whom the bill had been addressed in case eed by certain indorsers thereof, and who but for bliteration of the acceptance would have paid the refused to pay it. The declaration also contains nt for money had and received by the defendants e use of the plaintiff, and a count on an account d.

e defendants have pleaded—first, that they did not

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promise as alleged in the declaration; secondly, — to the first breach in the first count, — that they did use due care to prevent the acceptance from being defaced or obliterated; thirdly, — to the same breach, — that the acceptance did not become, nor was it defaced or obliterated, as complained of by the plaintiff; fourthly, — to the last breach in the first count, — that they did return the bill without having cancelled or destroyed the acceptance; fifthly, — as to so much of the last breach in the first count as imputes to the defendants that they cancelled the acceptance, and returned the bill with the acceptance cancelled, — that the promise mentioned in the first count was subject to a proviso, that, if the defendants should, with a view to the payment of the bill, cancel the acceptance without making it illegible, and afterwards within a reasonable time for returning the bill should discover that they had not funds or had not authority from the acceptor to pay the bill, or such authority should be revoked, the defendants should be allowed to write on the bill that it had been cancelled by mistake, and to return it cancelled, without paying it: the plea then goes on to aver the matters necessary to bring the breach to which it is pleaded within the terms of this proviso, and concludes with a verification.

The plaintiff joins issue on the first four pleas, and replies *de injuriâ*, &c. to the fifth; on which replication, also, issue is joined.

The cause came on to be tried before me, at the sittings in *London* after *Trinity* term, 1838, when the jury found a special verdict, which states, in effect, that the bill in question was drawn, indorsed, and accepted as stated in the declaration; that the drawers and indorsers are foreign merchants residing beyond the seas; that certain indorsers, to wit, *A. Hesse* & Co., addressed the bill, in case of need, to Messrs. *Heath, Furze*, & Co.; that, on the morning of the 26th of *January* 1836, a

clerk of the plaintiff's bankers took the bill to the clearing-house, and put it into the defendants' drawer, from whence it was taken by the clerk of the defendants to them at their banking-house in order that they might determine whether they would pay it or not; that the defendants had funds of the acceptor sufficient to pay the bill; that the defendants cancelled the acceptance by drawing lines along and across the name of the acceptor in the manner usual with *London* bankers when they intend to pay bills made payable at their houses, and entered the bill in a book called the "paid-clearing-book," which they keep in order to know the total amount paid to the clearing-house in the course of the day; that *Richard Jellicoe*, the acceptor, on the same day, having determined to stop payment, ordered the defendants not to pay the bill, who thereupon wrote on it "cancelled by mistake — orders not to pay," and in that state returned it to the plaintiff's bankers at the clearing-house within the usual time for returning the bills which the bankers, at whose houses they are made payable, determine not to pay. The special verdict then sets out the course of business at the clearing-house, shewing that (except so far as the cancellation of the bill is concerned) the course usual when bills are not paid, was pursued in the present case. As to the cancellation, it finds, that it is usual to cancel such bills and cheques as are intended to be paid, by drawing lines along and across the name of the party for whom the payment is intended to be made, and that, when a cancellation has occurred *through error or mistake*, the same has been indicated in writing on the bill, note, or cheque returned; that Messrs. *Heath*, *Furze*, & Co., to whom the bill was addressed in case of need, refused to pay it, stating the cancellation as their reason; that it is optional with parties to whom bills are so addressed to pay them or not; that the plaintiff gave the defend-

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ants notice of such refusal to pay; that the bill was s[illegible] by the plaintiff to his immediate indorsers, who refus[illegible]e to pay it, stating that they did so on the ground of the cancellation; that *Richard Jellicoe*, on the day the bill became due, wishing to pay back to a correspondent a sum of 500*l.*, which the correspondent had remitted to him for the purpose of taking up a certain bill, applied to the defendants, and obtained discount of a bill of 500*l.*; and that the defendants retain in their hands the amount of the bill in question, in order to pay it to the plaintiff in the event of a judgment against the defendants. The special verdict then, in the usual form, leaves to the court to determine in whose favour the issues are to be found; and the jury assess the damages, in the event of the plaintiff being entitled to recover, at 345*l.*

In this state of the record, the court has to consider how each of the five issues is to be determined by the facts stated in the special verdict.

The first of these issues raises the question whether the defendants made the promise stated in the declaration, that is, that they would use due care to prevent the acceptance from being obliterated, and would, upon request within a reasonable time, pay the amount of the bill or return it without having cancelled or destroyed the acceptance. The facts stated in the special verdict, fro[illegible] which a legal liability and consequent promise to th[illegible] effect are, if at all, to be inferred, are, in substance, th[illegible] the plaintiff was the holder of a bill which the accept[illegible] had made payable at the defendants' banking-house, a[illegible] that the bill was delivered to the defendants by t[illegible] plaintiff's bankers on the morning of the day it becam[illegible] due, that they might determine whether they would p[illegible] it or not, and return it to the plaintiff if they did n[illegible] choose to pay it; that it is usual to cancel bills intend[illegible] to be paid, by drawing lines along and across the na[illegible] of the party for whom the payment is intended to [illegible] made; and that, where a cancellation has occurre[illegible]

rough error or mistake, the same has been indicated a writing on the bill returned. The duty to be inferred rom these facts appears to us to fall short of the promise laid in the declaration; that duty being no more than to take due care of the bill, and, if the banker does not choose to pay it, to return it uncancelled, unless it has been cancelled by error or mistake, and in that case o indicate that it has been so cancelled, by writing on he bill; but that there is not, as it appears to us, any romise to pay if the bill is not returned, or to pay or eturn the bill, as laid in the declaration, nor an unualified promise to return the bill uncancelled if not aid, but a promise only to return the bill, if not paid, ncancelled, *unless cancelled by error or mistake.* If he plaintiff's argument be well founded, a banker who omitted to return a bill would be bound by a promise to pay the amount of it, though it should be of no value, by reason of all the parties being insolvent, or all the names forgeries. According to our view, the banker does not become liable to pay the amount of the bill by defacing or not returning it; but by so doing, if it be wrongfully done, he becomes liable to damages for his breach of duty. He has no duty *to pay:* it is, as between him and the holder of a bill, always optional whether he will pay it or not, till he actually pays it. or these reasons, we think the plea, that they did not omise, is to be considered as found for the defendants. The question on the second issue is, whether the dedants did use due care to prevent the acceptance ing defaced. The only way in which the bill has en defaced being the cancellation made by the defendts when they might reasonably expect they would ve to pay the bill, and such cancellation being made the usual course, and the mistake indicated in the sual manner, it appears to us that this issue is also in ffect found for the defendants.

The third plea denies that the acceptance was defaced

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or obliterated. It appears to us, that though it was d[redacted]e faced in a manner and under circumstances whi[redacted]ch excuse the defendants, yet in fact it was defaced with[redacted]in the meaning of the allegation traversed by the plea; t[redacted]he issue therefore, on this plea, must be considered as fou[redacted]nd for the plaintiff.

And, in like manner also, the issue on the fourth pl[redacted]ea is in effect found for the plaintiff, inasmuch as the spe-cial verdict shews that the defendants did not, in fa[redacted]ct, return the acceptance uncancelled.

The fifth plea states, in effect, that the promise was different from that laid in the declaration, and is there-fore a denial of that promise. But, the matters in this plea being put in issue, it is necessary to decide how it is to be considered as found: and we think that the facts stated in the special verdict shew that the promise of the defendants was subject to such a proviso as is stated in this plea, and that the other allegations of this plea, bringing the case within the terms of the proviso, are also supported; for it appears to us that the cancella-tion, under the circumstances stated, was a cancellation *by error or mistake*, within the meaning of the statement of the usage on that subject, and that, therefore, the fifth plea must be considered as found for the de-fendants.

It was contended, for the plaintiff, that, supposing he could not succeed in the special count, he might recover on that for money had and received by the defendants to his use. But we are of opinion that the plaintiff has no such right. There are many cases which establish that no action for money had and received will lie against a banker or agent in respect of funds which his princi-pal has ordered him to pay to any person, at the suit of the person in whose favour the order is made, when the banker or agent has not assented to the order and com-municated his assent to the plaintiff. In the present case no such assent or communication took place; the

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r communication made to the holder of the bill being return, with a statement that the cancellation was le by mistake, and that the defendants had orders to pay.

t was also suggested by the learned counsel for the ntiff, — though not much insisted on, — that, even ugh the issues should be found against him, the court ht give judgment for him according to the very right justice of the case, independently of the pleadings, er the provision of the 3 & 4 *W.* 4. *c.* 42. *s.* 24. But provision applies only where the jury at the trial actually found the facts *for the purpose* of obtaining a judgment of the court, and not to a case like the ent, where the facts are found by the jury in order able the court to determine the issues on the record, for that purpose only.

s, therefore, the defendants are in our opinion en- l to succeed on some of the issues which go to the le cause of action, our judgment must be for the ndants.

Judgment for the defendants.

DOE dem. GOWAR *v.* ROE.

Jan. 16.

Service of a declaration in ejectment at the office of the tenant, an attorney, upon his clerk, who accepted the service, was held sufficient.

OMPAS Serjt. moved for judgment against the casual ejector. There were several tenants. Upon of them, an attorney, the service of the declaration notice had been effected by delivering a copy to erk of the tenant at his office, the clerk saying at the e that he would accept service for his principal, who out of town.

Per curiam;

Rule granted.

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Jan. 16.

WILKES *v.* PERKS.

The three days following *Christmas* day, though made holidays at the offices by 3 & 4 *W.* 4. *c.* 42. *s.* 43., are reckoned in legal proceedings.

The plaintiff applied to sign judgment on the 3d of *January* (when the time for pleading expired), but upon the officer suggesting that there was a doubt whether those three days were to be reckoned in the time for pleading, he forbore to sign judgment. On the same day the defendant died. The court refused to allow the plaintiff to sign judgment *nunc pro tunc.*

THE writ of summons in this action was served on the 16th of *December* 1842, and the declaration filed and notice thereof served on the 24th of the same month, with notice to plead in eight days. On *Tuesday*, the 3d of *January* 1843, the time for pleading having expired on the preceding day (reckoning the *Christmas* holidays), and no plea having been delivered, the plaintiff's attorney went to the Master's office for the purpose of signing judgment, when he was told by the officer that a doubt existed as to whether or not *Christmas* day and the three days succeeding, during which the office was closed, were to be reckoned in the time for pleading, and it was suggested to him that the safer course would be to abstain from signing his judgment then. The plaintiff's attorney thereupon forbore to sign judgment. The defendant died on the same 3d of *January.*

Talfourd Serjt., upon an affidavit of the foregoing facts, now moved that the plaintiff might be at liberty to sign judgment as of the 3d of *January.* No doubt could properly arise. It is clear that the three days after *Christmas* day are not excluded from the computation of time to plead, though, by the 3 & 4 *W.* 4. *c.* 42. *s.* 43., they are retained as *holidays* at the offices. They are not mentioned in the *R. H.* 6 *W.* 4., by which additional holidays are appointed; or in the *R. E.* 2 *W.* 4. *r.* 1., which specifies certain days which are not to be included in rules or notices or other proceedings. The plaintiff in this case was entirely misled by the officer of the court, and ought therefore to have relief.

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TINDAL C. J. The plaintiff might have had ground for the present application if the officer had *refused* to sign judgment. But he merely suggested a doubt, which it was in the option of the attorney to assent to or not. I think we cannot interfere.

ERSKINE J. concurred.

MAULE J. The attorney did not insist on his right to sign judgment; but appears to have rather too readily yielded to an erroneous suggestion gratuitously made by an irresponsible party. If we granted the rule, we should be interfering with the rights of others who are free from all blame.

CRESSWELL J. concurred.

The learned serjeant

Took nothing.

WARD *v.* DUCKER.

Jan. 17.

Where the notice of an application to postpone a trial omitted to offer to pay the costs of the postponement, the court, on making the rule absolute, gave the plaintiff as well the costs of the postponement of the trial as also the costs of the motion, notwithstanding cause was shewn in the first instance.

DOWLING Serjt., on behalf of the defendant, moved to postpone the trial of this cause on the ground of the absence of a material witness.

Talfourd Serjt. shewed cause in the first instance. The court were proceeding to make the rule absolute on payment of the costs occasioned by the postponement, when the learned serjeant submitted that the

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plaintiff was also entitled to the costs of the application, as he had been compelled to appear, in consequence of there being no offer of costs in the notice of motion.

Dowling Serjt. contended, that, according to the usual practice as laid down in all the books (*a*), no costs are given when cause is shewn in the first instance.

Per curiam. That is undoubtedly the general rule; but here the defendant has omitted in his notice of motion to offer the costs of the postponement of the trial, and consequently he must pay for having perhaps unnecessarily brought the plaintiff here.

Rule absolute accordingly.

(*a*) See *Tidd's Pr.* 503. 9th ed.; *Lush Pr.* 771.

Jan. 20.

Ex parte ANN TANNER DUFFILL.

Form of rule to dispense with the concurrence of a husband in the conveyance of property to which the wife alone is entitled, under 3 & 4 *W.* 4. *c.* 74. *ss.* 77. 91.

BOMPAS Serjt., in last *Michaelmas* term, obtained a rule under the 3 & 4 *W.* 4. *c.* 74. (*a*), on behalf of *Ann Tanner Duffill*, a feme covert, to dispense with the

(*a*) By sect. 77. it is enacted, "that after the 31st day of *December* 1833 it shall be lawful for every married woman, in every case except that of being tenant in tail, &c., by deed, to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also *to dispose of, release, surrender, or extinguish* any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in, or limited or reserved to, her in regard to any lands of any

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of her husband, *Henry Holland Duffill*, in ıce of certain property to which he was titled.

ıvit of Mrs. *Duffill*, upon which the rule , stated (*inter alia*), that by a sentence or Arches Court of *Canterbury*, passed on the *uary* 1836, in a suit instituted by the de- st the said *H. H. D.*, *the said* H. H. D. *was bed, board, and mutual cohabitation with the* d that shortly before the said divorce was is to say, on or about the 31st of *January* d *H. H. D.* left *England*, and, as the de- been informed and believed, went to the

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such money as ı regard to any ds of any tenure, money as afore- nd effectually as she were a feme except that no ın, release, sur- ıguishment shall effectual unless ncur in the deed same shall be ıless the deed be ıy her as herein- &c.

, it is provided that if a hus- consequence of , idiot, or of un- and whether he n found such by ot, or shall, from e, be incapable of ed or of making f lands held by roll, or if his not be known, n prison, *or shall t from his wife,* ıal consent or *by ɔrce,* or in conse- quence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at *Westminster*, by an order to be made in a summary way upon the application of the wife, and upon such evidence as *to the said court* shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this act or otherwise; and all acts, deeds, or surrenders, to be done, executed, or made by the wife in pursuance of such order, in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a feme sole, and when done, executed, or made by her, shall (but without prejudice to the rights of the husband as then existing independently of this act) be as good and valid as they would have been if the husband had concurred," &c.

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United States of *America*, and had not since returned to this country, to the knowledge or belief of the deponent.

The mandatory part of the rule was in the following terms: —

"It is ordered that the said *Ann Tanner Duffill* be at liberty, by deed or surrender, to *make disposition of, and to convey*, all her estate and interest, of and in the hereditaments and premises in the said affidavit mentioned, to such person or persons as she may think fit, without the concurrence of her said husband, it appearing by the said affidavit that the said *Henry Holland Duffill left* England *some years since, and hath not since returned to this country.*"

Bompas Serjt. now moved that the rule might be amended (in order to make it conform more closely to the language of the act), by introducing the words "to dispose of, release, surrender, or extinguish," in lieu of the words, "to make disposition of and to convey;" and also by substituting for the statement that the husband had "left *England* some years since, and had not since returned to this country," an allegation that the parties were living apart under sentence of divorce. It appeared that the conveyancer, who acted for the purchaser, had objected to the sufficiency of the rule as drawn up.

Per curiam. It is certainly better that the language of the statute should be adhered to as closely as possible. It is not inconsistent with the rule as at present framed, that the parties may be living abroad together.

The rule was accordingly drawn up in the following form: —

"It is ordered that the said *Ann Tanner Duffill* be

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)y deed or surrender, *to dispose of, release, or extinguish* all her estate and interest of hereditaments and premises in the said affi-)ned, to such person or persons as she may ithout the concurrence of her said husband, ; *to the court*, by the said affidavit, that the *Holland Duffill is living apart from his said ence of divorce.*"

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10th of *March* 1842 a declaration in as- it in this action was delivered, consisting of . On the 14th of the same month the de- ivered a special demurrer to the first count, a of non assumpsit to the last three counts. th the demurrer to the first count was set judge's order as frivolous; and on the 19th /as signed by the plaintiff on the first count a plea. On the 22d this judgment was set

Where the defendant delivers a plea duly signed by counsel, and afterwards, under a judge's order, delivers additional pleas without such signature, *quære*, whe-

)tiff can treat such additional pleas as nullities; but the plaintiff was not entitled to sign judgment upon the whole) for want of a plea; inasmuch as even assuming the additional pleas s, they did not avoid the first plea, which was well pleaded.

)king a judge's order a rule of court was dated the 16th of *July*, " as of *Trinity* term" preceding: Held, to be properly drawn up.

ler the judgment was set aside, with costs to be taxed: they were *s.*, and not paid. The rule of court recited the order verbatim, and)ayment of the costs of making the order a rule of court; which)rds taxed. A *fi. fa.* was sued out directing the sheriff to levy the sum which had been ordered to be paid to the rule of court, to- nterest at 4 per cent. (pursuing the form No. 8. appended to *R. H.* eld, that the *fi. fa.* and the levy thereunder were irregular, the) being applicable only to cases where the payment of *a specific* / is ordered.

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aside for irregularity by a judge's order, by which, however, leave was given to the plaintiff to amend the declaration on payment of costs, the amount of which was by a subsequent order fixed at 4*l.*, and ten days were allowed for the payment of that sum; at the expiration of which time, on failure of payment by the plaintiff, the defendant was to be at liberty to sign judgment for want of a joinder in demurrer. The costs not having been paid within the time allowed, the defendant signed judgment on the first count. On the 6th of *June* the defendant obtained a judge's order that he should be at liberty to add a plea of payment and a plea of set-off to the plea of non assumpsit already pleaded to the last three counts. This order having been made a rule of court, pleas of payment and of set off were in due time delivered, with a copy of the rule of court: but the pleas so delivered were neither dated nor signed by counsel, and thereupon the plaintiff, on the 7th of *July*, signed interlocutory judgment for want of a plea to the last three counts of the declaration, and on the 9th served the defendant with notice of a writ of inquiry before the sheriff: whereupon the defendant obtained a summons for setting aside this judgment on the last three counts; and on the 14th of *July* an order was made by *Coleridge* J. that the judgment so signed by the plaintiff on the 7th of *July* should be set aside with costs to be taxed, to be paid by the plaintiff to the defendant, his attorney or agent. On the 16th of *July*, the costs of setting aside the judgment of the 7th were taxed, and allowed by the Master at the sum of 6*l.* 5*s.*; and the *allocatur* was indorsed on the order of *Coleridge* J.; and that sum was on the same day demanded of the plaintiff's attorney, who declined to pay it, on the ground of his not having at that time received any instructions from his client for that purpose. No other demand was made of payment of such costs. On the

same 16th of *July* a rule of court was drawn up, which was intituled as of *Trinity* term, 5 *Victoria*, but dated *Saturday*, 16th of *July*, and which, after reciting verbatim the order of *Coleridge* J. of the 14th of *July*, made that order a rule of court, and further ordered that the plaintiff should pay to the defendant or his attorney the costs of, and occasioned by, that application to the court, to be taxed by one of the Masters of the court. The costs of that application and rule were afterwards taxed, but no notice of such taxation was given to the plaintiff's attorney. On the 18th of *July* a writ of *fieri facias* was sued out by the defendant, directed to the sheriff of *Middlesex*, which was in this form: — "We command you that, of the goods and chattels of *Henry Badman* in your bailiwick, you cause to be made 9*l.* 6*s.* 8*d.*, which lately in our court before our justices at *Westminster*, by rule of our said court, intituled '*Trinity* term, in the fifth year of the reign of Queen *Victoria* — *Badman* against *Pugh*. *Saturday*, 16th of *July*,' — were by the said court ordered to be paid by the said *Henry Badman* to the said *John Pugh*; and that, of the goods and chattels of the said *Henry Badman* in your bailiwick, you further cause to be made interest upon the said sum of 9*l.* 6*s.* 8*d.*, at the rate of 4*l.* per cent. per annum from the 18th of *July* 1842," &c. &c. By the indorsement upon the writ, the sheriff was directed to levy 9*l.* 6*s.* 8*d.*, and interest thereon at 4*l.* per cent. per annum from the 18th of *July*, till paid, besides 16*s.* for the writ, sheriff's poundage, officers' fees, costs of levying, and all other incidental expenses. The costs of the rule of court were never demanded of the plaintiff, and they formed part of the sum of 9*l.* 6*s.* 8*d.* mentioned in the said writ and the indorsement thereon. On the 18th of *July* the sheriff seized the plaintiff's goods under the writ, and on the 23d an application was made by the plaintiff to *Coleridge* J. at chambers,

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to set aside the rule of court and the writ of *fieri facias* issued thereon, for irregularity; and upon such application an order was made, that, upon payment by the plaintiff of 15*l.* into court in a week, to abide the event, the sheriff should withdraw, and that all proceedings under the said rule of court should be stayed until the fifth day of the then next *Michaelmas* term. The sum of 15*l.* was paid into court, and the sheriff withdrew the execution, pursuant to such order.

Sir *T. Wilde* Serjt., in *Michaelmas* last (*November* 5th), upon an affidavit of the foregoing facts, obtained a rule nisi to set aside the order of *Coleridge* J. of the 14th of *July*, the rule of court of the 16th of the same month, and the writ of *fi. fa.*, for irregularity; and that the sum of 15*l.*, paid into court pursuant to the order of *Coleridge* J. of the 23d of the same month, should be paid out of court to the plaintiff or his attorney.

The learned serjeant submitted that as the added pleas were not dated or signed by counsel, the plaintiff was in a situation to sign judgment, and that therefore the last-mentioned order of *Coleridge* J. for setting aside the judgment was irregular — that assuming the order to have been right, the rule of court was wrongly entitled (upon this point he cited *The King* v. *Price* (*a*)) — that even if it were properly entitled as of the previous term, it could not be effectual as a judgment of that term under the statute 1 & 2 *Vict. c.* 110., so as to warrant the issuing of the *fi. fa.* in vacation — that the *fi. fa.* itself was irregular because there had not been any personal demand of the costs upon the plaintiff; because the writ was not in the form prescribed by the rule of court framed in pursuance of the stat. 1 & 2 *Vict. c.* 110.; and because the indorsement to levy the

(*a*) 2 *C. & M.* 212., 2 *Dowl. P. C.* 233.

enses and poundage was bad, (upon this point he d *Baker* v. *Sydee* (*a*), *Archb. Prac.*, p. 416. 7th edit.) and that, at all events, the levy itself of such expenses l poundage, would be irregular. (*b*)

Channell Serjt., on a subsequent day in the same m (*November* 24th), shewed cause upon affidavits by e managing clerk of the defendant's attorney, and by e plaintiff's late attorney. In the first of these it as sworn that, at the time the added pleas were de-ered, the attention of the plaintiff's attorney was lled to the fact of their not being either dated or gned; that the defendant's attorney suggested that, nder the circumstances, no date or signature was ne-essary; and that the plaintiff's attorney acquiesced. It as also sworn that a copy of the rule and appointment o tax had been served on the plaintiff's attorney; and t was further sworn, by the managing clerk, that the um of 15*l.* never was paid into court under the judge's rder of the 23d of *July*, but that the sheriff, having received the amount of the levy, had, under a judge's order, paid to the defendant's attorney 10*l.* 2*s.* 8*d.*, as the amount of the levy under the *fieri facias*.

Sir *T. Wilde* Serjt. (whose argument, as well as that of *Channell* Serjt., is fully stated in the judgment of the court,) was heard in support of the rule.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. (After stating the substance of the affidavits, his lordship proceeded thus.) Upon these affidavits, my brother *Wilde* was compelled to abandon that part of his rule which asked for the payment of the 15*l.* out of

(*a*) 7 *Taunt.* 179.

(*b*) It did not distinctly appear from the affidavits that any poundage had been in fact levied.

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court, and also to relinquish his objection that no notice to tax the costs under the rule of court had been given to the plaintiff; but he still insisted — first, that the judgment signed on the 7th of *July*, for want of a plea to the last three counts of the declaration, was regular, and therefore that the order of my brother *Coleridge*, of the 14th of *July*, setting the judgment aside, and all the proceedings, ought to be set aside by the court; secondly, that, even if the judgment was irregular, and my brother *Coleridge's* order right, the rule of court was irregular, and ought to be set aside, because, the order having been made in vacation, the rule of court ought to have been intituled as of the next succeeding term; thirdly, that, if the rule of court was properly intituled as of the preceding term, it could have no effect as a judgment of that term to warrant the issue of the *fieri facias* in the vacation, and, therefore, that the *fieri facias* and the levy under it were, at all events, irregular: and he further objected that the writ and execution ought to be set aside — first, on the ground that, as the effect given to rules of court for the payment of money or costs was intended as a substitute for the remedy by attachment, a personal demand of the costs ought to have been made upon the plaintiff before the execution was issued; secondly, because the writ of *fieri facias* was not in the form prescribed by the rules of all the courts, framed under the statute 1 & 2 *Vict. c.* 110.; and, thirdly, because the indorsement to levy expenses of the writ and sheriff's poundage was erroneous, and rendered the writ itself bad; and lastly, he objected, that, at all events, the levy of the expenses of the writ and sheriff's poundage was irregular, and ought therefore to be set aside.

It will be necessary to consider each of these grounds of objection in their order.

As to the objection, on the ground of the irregularity of the judgment, it was contended, on the part

plaintiff, that the judgment signed on the 7th of *July*, for want of a plea to the last three counts of the declaration, was regular, inasmuch as the pleas of payment and set off were neither dated nor signed by a serjeant, and that the plaintiff might therefore treat them as nullities. But as, in this case, the general issue had been well pleaded already to the last three counts, which plea had not been withdrawn, we cannot see how the subsequent delivery of two pleas, even admitting them to be nullities, for the reasons before urged (on which, however, we give no opinion) (*a*), can be held to avoid the effect of the plea of non assumpsit. We are, therefore, of opinion that the judgment signed by the plaintiff was irregular, and that the order of my brother *Coleridge* ought not to be disturbed.

The second objection is as to the sufficiency of the rule of court. That rule is intituled of *Trinity* term, and is dated the 16th of *July*, and, after reciting the order of my brother *Coleridge*, dated the 14th of *July*, makes that order a rule of this court; and the objection is, that the rule is inconsistent with itself, and bad, because it affects to give to an order dated the 14th of

(*a*) In the course of the argument the following observations were made by the learned judges upon this point. *Tindal* C. J. The question is whether the added pleas are to be considered as pleaded *nunc pro tunc*. *Maule* J. Or whether they are not in the nature of an amendment, by addition. *Erskine* J. The plea of non assumpsit remains; and that is not a nullity. At most, the objection would amount to this, that the leave to add pleas has not been taken advantage of by reason of the absence of signature. Sir *T. Wilde* Serjt. submitted that the same observation would apply if the pleas had been pleaded at the same time with the general issue, which, of itself, would not require signature; but if it was pleaded with other pleas which required signature, the plaintiff might sign judgment upon the whole record if the signature were omitted. So, if a defendant were under terms to plead issuably, and he pleaded one unissuable plea, the plaintiff might sign judgment. *Maule* J. The defendant would not, in that case, have complied with the order.

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July the effect of a judgment by this court of the preceding *Trinity* term; and the case of *The King* v. *Price* was cited, as an authority that no such effect could be given to it. Upon reference to our officers, it appears that it always has been the practice of this court for the officer to draw up, and deliver out in vacation, rules of court making orders of judges issued in vacation rules of court as of the preceding term. And the same practice appears to have been at one time adopted by the court of Exchequer. But, in the case of *The King* v. *Price*, that court, in 1833, refused to grant an attachment for disobedience to a judge's order obtained in vacation, which had been made a rule of court as of the preceding term, on the ground of the incongruity of such a proceeding; observing, that the practice of drawing up such rules as of the preceding term ought to be discontinued, and that the order might be made a rule of court of the succeeding term.

The practice was, nevertheless, still continued in this court, and has since been sanctioned and established by a rule of all the courts, made by the judges in *Hilary* term, 1 *Victoria*, under the provisions of the statute 3 & 4 *Will.* 4. *c.* 42. *s.* 1., whereby it is ordered, "that every rule of court delivered out in vacation, shall be dated the day of the month and week on which the same is delivered out, *but shall be intituled as of the term immediately preceding such vacation.*"

The rule, therefore, has been drawn up according to the form prescribed to the officers by this general rule; and we see no reason why this form should not be adopted in cases like the present, where it is sought to enforce the payment of costs under a judge's order, as well as in the ordinary cases of rules to plead several matters, or rules to compute, which, by reference to the title of the term, would (since the new practice of dating the summons and pleadings) in very many cases appear

have been prematurely made, but which are placed in their proper order by reference to the date, inserted according to the general rule. The insertion of that date protects the parties from any undue use of the title of the term, while the party entitled to the payment is enabled to avail himself of the more speedy remedy provided by the statute 1 & 2 *Vict. c.* 110.; and the incongruity is, in substance, removed by shewing the real day when the rule of court was drawn up, and from which it commences its practical operation. We think, therefore, that the rule of court was properly drawn up, and that it warranted the issuing in vacation of a writ of *fieri facias*, to enforce the payment of the costs awarded.

The remaining objections relate to the regularity of issuing the *fieri facias*, and the levy under it: but, although several objections have been raised against them, it will be unnecessary to consider any other than that which relates to the form of the writ; upon which objection we agree that the writ of *fieri facias* is irregular, and must be set aside.

The objection, in point of form, is, that the writ is not such as is prescribed by the general rule framed by the judges under the provisions of the statute 1 & 2 *Vict.* c. 110. *s.* 20. That rule is to be found in 9 *Ad. & E.* 986., and 7 *Scott*, 1.; and, in form No. 8., is found the form of a writ of *fieri facias* on an order of court for payment of *money*, and in No. 9. the form of a similar writ on an order of court for the payment of *money and costs*; but there is no form for the payment of *costs only*.

The defendant has in this case adopted the form prescribed by No. 8., from which, on the face of the writ, it would appear that the rule of court had specified the sum of 9*l.* 8*s.* 8*d.* as the sum to be paid by the plaintiff to the defendant; whereas the rule of court names no sum, but, by adopting my brother *Coleridge's* order, in effect orders the plaintiff to pay to the defendant the

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costs of setting aside the judgment of the 7th of *July*, to be taxed by the Master, and then explicitly orders the payment of the costs of, and occasioned by, the application to make that order a rule of court. The form, therefore, most applicable to the case is, the latter part of the form No. 9., by which the order to pay the costs, and the taxation of those costs at a specified amount, are set out in succession. But it was said by the defendant's counsel, that, as there was no form precisely applicable to this case, and as the order to pay costs to be taxed was in substance an order to pay the amount eventually allowed by the Master, the variation came within the saving clause of the rule prescribing the forms, by which saving it is declared that any variance, not being in matter of substance, shall not affect the validity of the writs sued out; for that no variance, in matter of substance was to be found in this writ from the form prescribed. But we think, that although the costs of setting aside the judgment, the amount of which had been ascertained by taxation before the rule of court was made, might be considered as at that time a definite sum of money (though not specifically ordered by the court to be paid by the plaintiff), yet the costs of the rule, not then ascertained, could not be so considered; and that, as the form No. 9. expressly points out how the costs of the rule are to be stated on the face of the writ, making the date of the taxation the period from which the interest is to commence, we must assume that the judges considered that statement material, and a matter of substance, so as to make the total omission of it an irregularity at least. It is true that, in this case, the date from which the interest is to be calculated is, in fact, the date of the taxation of the costs of the rule, and is therefore the correct date; but there is nothing on the face of the writ to shew such date; and to hold this writ sufficient would be, in effect, to hold the form No. 9. to be

altogether superfluous; and that, in all cases, even where the costs of the rule are included in the levy, the form No. 8. will be sufficient.

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We are therefore of opinion, that so much of the rule as seeks to set aside the writ and the levy under it should be made absolute; and, as it becomes unnecessary to say anything about the two remaining objections to the indorsement of the writ (*a*) and the levy, the rest of the rule will, of course, be discharged.

But we think that the best conclusion to this harassing proceeding would be, for the defendant to take, by consent, a rule, that, on payment of the costs of this application and refunding the costs of the writ and the sheriff's poundage within one week, the defendant shall be at liberty to amend the writ, by substituting the sum of 6*l.* 5*s.* for that of 9*l.* 6*s.* 8*d.* at the commencement of the writ, and adding the clause for the costs of the rule, as prescribed by form No. 9., and at the same time omitting the costs of the writ and the sheriff's poundage in the indorsement, the plaintiff undertaking to bring no action; otherwise, the rule must be made absolute for setting aside the writ and the levy under it. (*b*)

(*a*) *Maule* J., in the course of the argument, said — How does the indorsement vitiate the writ? The indorsement is a mere direction to the sheriff. If there were an indorsement on a *fi. fa.* directing him to seize the freehold, would that vitiate the writ itself?

(*b*) The proposed arrangement not having been acquiesced in, the rule was drawn up for setting aside the writ and levy, and the plaintiff brought an action of trespass against the defendant.

Channell Serjt. moved in this term to stay the proceedings in the second action; but the court were of opinion, that although they might have interposed, if the rule had been made absolute *with costs*, on the ground that the costs had been awarded to the plaintiff upon an *implied* undertaking that no action should be brought, as the case stood the plaintiff had not entered into any such implied engagement, and consequently they had no power to restrain him from pursuing his legal rights.

The plaintiff obtained a verdict, with 100*l.* damages.

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Jan. 20.

ALLNUTT and Others *v.* ASHENDEN.

The following guarantee, — "I hereby guarantee *B.*'s account with *A.* for wines and spirits, to the amount of 100*l.*" — there being at the time of the giving of such guarantee, an existing account between *A.* and *B.*, upon which *B.* was indebted to *A.* (though in a less sum than 100*l.*), was held to be a guarantee for the payment of such existing account, and not to extend to future supplies of goods.

ASSUMPSIT. The declaration stated that the plaintiffs, before and at the time of the making of the guarantee thereinafter mentioned, carried on the business of wine-merchants, and that one *John Jennings* had, before the making of the said guarantee, applied to, and requested, the plaintiffs to supply him, on credit, with wine and spirits, which the plaintiffs had consented, and agreed to do upon receiving the guarantee of the defendant thereinafter mentioned; and that thereupon the defendant, on the 14th of *April* 1838, in consideration that the plaintiffs, at the request of the defendant would sell and deliver to the said *John Jennings*, upon credit, certain wines and spirits, to wit, all such wines and spirits as the said *John Jennings* should have occasion for and require, promised the plaintiffs to guarantee the account of the said *John Jennings* with the plaintiffs to the amount of 100*l.* The declaration then alleged, that the plaintiffs, confiding in the said promise, did afterwards sell and deliver to the said *John Jennings*, on credit, divers large quantities of wine and spirits, which the said *John Jennings* then had occasion for and required of the plaintiffs, at and for reasonable prices then agreed upon by and between the plaintiffs and the said *John Jennings*, amounting to a large sum, to wit, 300*l.*; that although the said credit had expired, yet the said *John Jennings* had not, although requested so to do, paid for the same or any part, of which the defendant had notice; and that the defendant had not, although requested so to do, paid to the plaintiffs the sum of 100*l.* or any part thereof, on account of the said wines and spirits, pursuant to his said guarantee.

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The defendant pleaded, first, non assumpsit (*a*), ondly and thirdly, two other pleas, upon which hing turned, and which before the argument were ick out of the record by agreement; fourthly, pay- it by *Jennings*, and acceptance by the plaintiffs, of l., in satisfaction.

The replication traversed the payment and acceptance atisfaction; upon which issue was joined.

The cause came on to be tried before *Tindal* C. J., the adjourned sittings for *London* after *Michaelmas* n 1841, when a verdict was found for the plaintiffs, nages 200*l.*, subject to the opinion of the court upon following case, with liberty for either party to turn same into a special verdict; the court to have the ie power to amend the record, if necessary, as a judge nisi prius:

The plaintiffs are wholesale wine-merchants, carrying business in *Mark Lane*, in the city of *London*, under style and firm of *Allnutt* and *Arbouin*. The de- dant is a brickmaker, residing near *Sittingbourne* in t. Previously to the guarantee hereinafter men- ed being given, viz. on the 3d of *April* 1838, the intiffs had supplied spirits to *John Jennings*, men- ed in the declaration and in the guarantee herein- r mentioned, to the amount of 83*l.* 1*s.*

John Jennings, at the time when the spirits were plied as aforesaid, and also at the time when the rits were supplied as hereinafter mentioned, kept the g's *Hotel* at *Canterbury*.

On the 14th of *April* 1838, the defendant, at the uest of *Jennings*, and on the application of Mr. nons, the commercial traveller of the plaintiffs, signed

(*a*) *Quære*, whether the plea non assumpsit admits the ter stated by way of *induce-* t to the promise, namely, t *Jennings* applied for further credit, and that the plaintiff agreed to give such further credit upon receiving the *prospective* guarantee mentioned in the declaration.

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and gave a guarantee, of which the following is a copy, and which guarantee was written by Mr. *Simons*: —

"Messrs. *Allnutt* and *Arbouin*, 50. *Mark Lane*.

"Sirs, — I hereby guarantee Mr. *John Jennings*'s account with you for wines and spirits, to the amount of 100*l*.

"(Signed) *E. Ashenden*.

"*Sittingbourne*, *April* 14th, 1838."

At the time when the defendant gave and signed the said guarantee, addressed to the plaintiffs as aforesaid, the only account between *Jennings* and the plaintiffs was the account for the said spirits so supplied as aforesaid, to the amount of 83*l*. 1*s*., the said supply of spirits being the only transaction which the plaintiffs and *Jennings* had had together prior to the time when the said guarantee was given. After the guarantee had been given, the plaintiffs continued, upon the orders and at the request of *Jennings*, to supply him from time to time with spirits up to the 24th of *November* 1840.

Between the date of the guarantee, and the said 24th of *November* 1840, the plaintiffs, from time to time, sold and delivered to *Jennings*, upon credit (which had expired before the commencement of this suit), spirits of the value altogether of 814*l*. 3*s*. 4*d*., at prices amounting to that sum, and the plaintiffs, between the date of the guarantee and the said 24th of *November* 1840, received payments from *Jennings* to the amount of 611*l*. 14*s*. 2*d*. on account of the spirits so supplied, leaving a balance against *Jennings* in favour of the plaintiffs upon the *whole* account, of 218*l*. 9*s*. 2*d*. (*a*), which was the amount due to the plaintiffs from *Jennings* at the commencement of this suit.

Before the commencement of this suit the defendant had notice of the facts above stated, and was requested

(*a*) This would apparently leave 16*l*. due on the old account.

to pay the plaintiffs, under his aforesaid guarantee, the sum of 100*l.*, part of the moneys so due from *Jennings* to the plaintiffs for spirits so supplied as aforesaid; which the defendant refused to do.

The questions for the consideration of the court are, first, whether the said guarantee was binding upon the defendant in point of law; secondly, whether the same was a continuing guarantee. (*a*)

If the court shall be of opinion that the guarantee was binding upon the defendant in point of law, and that the same was a continuing guarantee, the verdict is to be entered for the plaintiffs for 100*l.* damages.

If the court shall be of opinion that the guarantee was not by law binding upon the defendant, or that it was not a continuing guarantee, a verdict is to be entered for the defendant.

Channell Serjt. (with whom was *Peacock*) for the plaintiffs. The first question is, whether this is a binding guarantee; and it is submitted that a sufficient consideration appears on the face of it. *Haigh* v. *Brooks* (*b*), which was an action of assumpsit on a promise made by the defendant in consideration that the plaintiffs would give him up a guarantee then held by them, is in favour of the present plaintiffs. There, the guarantee was in these terms:—"Messrs. *H.* (the plaintiffs), in consideration of your being in advance to *L.* in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount, on their behalf. *J. B.*" It was held by the court of Queen's Bench, and afterwards by the Exchequer Chamber, that the guarantee

(*a*) These questions appear to be substantially the same; as unless the guarantee related to goods to be *subsequently* delivered, it would fail to be binding for want of consideration.

(*b*) 10 *A. & E.* 309., *S. C.*, in error, *ib.* 323.; 2 *P. & D.* 477., *S. C.*, in error, 3 *P. & D.* 452.

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did not necessarily imply a past advance, and that, on a trial, the plaintiffs might have given evidence to shew that future advances were contemplated. [*Cresswell* J. The main ground for the decision in that case was, that the thing given up was of *some* value.] *Raikes* v. *Todd.* (*a*) It is submitted that the words of this guarantee, by fair and necessary intendment, mean wine and spirits not already furnished, but *to be* supplied. In *Kennaway* v. *Treleavan* (*b*) it was held that a sufficient consideration was disclosed on the face of a guarantee, which was in these words: — "I hereby guarantee to you the sum of 250*l.*, in case Mr. *P.* should make default in the capacity of agent and traveller to you." With respect to the second question, if this is a binding guarantee, it is clearly a continuing one. In *Mayor* v. *Isaac* (*c*) the guarantee was as follows: — "In consideration of your supplying my nephew *V.* with china and earthenware, I guarantee the payment of any bills you may draw on him on account thereof, to the amount of 200*l.*" It was held that the guarantee was a continuing one, and that the defendant was liable upon it, although, after the guarantee, goods to a greater amount than 200*l.* had been supplied to, and paid for by, *V.* Here, the guarantee is clearly given, not for any particular wine and spirits, but for wine and spirits generally. This case is distinguishable from *Jenkins* v. *Reynolds* (*d*); for there the guarantee contained no statement of what the account was for and as the nature of the consideration did not appear it might be for an illegal debt.

Bompas Serjt., for the defendant, was stopped by the court.

(*a*) 8 *A.* & *E.* 846., 1 *P.* & *D.* 138.
(*b*) 5 *M.* & *W.* 498.
(*c*) 6 *M.* & *W.* 605.
(*d*) 3 *B.* & *B.* 14., 6 *J. B. Moore*, 86.

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TINDAL C. J. Applying to this guarantee, that rule of construction which has been so often laid down, that we must give to the words used their natural meaning, I do not see how this can be considered as a prospective guarantee; and if not, there is no consideration disclosed upon the face of it. The words are, "I hereby guarantee Mr. *John Jennings*'s account with you for wine and spirits, to the amount of 100*l*." By "account," I understand the parties to mean some account contained in some ledger or book; and the case shews that there was such an account existing at that time. The natural construction of the guarantee therefore is, that it relates to that account. In order to hold the construction contended for to be the sound one, we must say that the word means some account between the parties, which is to run on until a future time; but we cannot come to that conclusion when it is shewn that there was, at the time that the guarantee was given, an account to which it might apply. I think the proper construction of the instrument is, that it is an undertaking merely to be answerable for some *existing* account.

ERSKINE J. I am of the same opinion. The question which we have to determine is, not whether a good consideration appears on the face of the declaration, but whether a good consideration is disclosed on the face of the document itself. If my brother *Channell* could have established his first position, he would probably have had little difficulty with respect to the second; for if the operation of the instrument was prospective, it seems to me that it would have been a continuing guarantee. But, as has been stated by the Lord Chief Justice, the document contains no express words which point to any prospective supply of goods, neither does any thing appear from which it can be inferred that the parties contemplated any such supply. The primary

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meaning of the language used can only have reference to an existing account.

CRESSWELL J. (*a*) The utmost that can be said on behalf of the plaintiffs is, that the guarantee is ambiguous. If I am to put a construction upon it, I should say that it applies to some present existing account.

Judgment for the defendant. (*b*)

(*a*) *Maule* J. was absent from indisposition.

(*b*) Had mercantile witnesses been examined at the trial, it is probable that they would have concurred in stating, that the word "account" in this guarantee, would be understood in the commercial world, as equivalent to the word "dealings."

It may also be observed, that the guarantee was for an account between a publican and his wine merchant "to the *amount* of 100*l.*;" and the existing account, or existing item of account, consisted of one sum (resulting from a single dealing) of 83*l.* 1*s.*

And see further as to continuing guarantees, *Hitchcock* v. *Humfrey*, *post*, 559.

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BSON and Others, Assignees of GEORGE MARTIN, a Bankrupt, *v.* BRUCE and Another.

Jan. 23.

ASSUMPSIT, brought to recover money alleged to have been paid by *Martin*, before his bankruptcy, the use of the defendants at their request. Plea: assumpsit.

At the trial before *Tindal* C. J., at the sittings in *ndon* after last *Trinity* term, it appeared that *Martin*, ing in embarrassed circumstances, on the 15th of *bruary* 1837, entered into a deed of composition with creditors to secure to them the payment of 7*s.* in the und upon the amount of their respective debts. The endants, amongst other creditors, executed the deed; t before they did so they obtained from *Martin* a

In 1837 *A.*, being in embarrassed circumstances, executed a deed to secure to his creditors a composition of 7*s.* in the pound. *B.*, a creditor, refused to sign the deed until *A.* made *B.* a promise to give him security for

difference between the composition and the full amount of the debt. Pur- nt to that agreement *A.* subsequently handed over to *B.* his promissory es, payable to *B.* or order. *B.* indorsed the notes, and paid them in to his kers at *Leeds*, to whom *B.* was in the habit of indorsing all bills and notes eived by him, and drawing generally on account. When the notes were at turity the *London* correspondents of the *Leeds* bankers presented them to *A.*, whom they were paid. *A.* continued to deal with *B.* down to his bankruptcy 1840) without ever complaining of the transaction or attempting to set off e payments made in respect of the notes against the subsequent demands of against him. No evidence was given to shew the state of the account between and the *Leeds* bankers at the time of the payments, or that *A.* knew the haracter in which the notes were held by the bankers who presented them. In n action for money paid by *A.* to the use of *B.*, brought by the assignees of *A.* o recover back the amount of these notes, the judge left it to the jury to say hether or not the payment was voluntary, and told them that if the payment as made to the bankers as agents only, it must be considered as voluntary; nd that if they found the payment to be voluntary, and to have been made ith a full knowledge of the circumstances, they must find for *B.*, otherwise r the plaintiffs.

The court directed a new trial, in order that the attention of the jury ght be more precisely called to the question — whether *A. knew* the character which the bankers presented the notes for payment, namely, whether as agents *B.* or as holders for value.

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promise that he would give them security for the difference between the amount of the composition and the amount of their original debt. Pursuant to that agreement, *Martin* subsequently gave the defendants certain promissory notes, payable to themselves or order, which notes the defendants indorsed and paid into their bankers, Messrs. *Williams, Williams, Brown*, and Co., at *Leeds*, who indorsed and remitted them to their *London* correspondents, *Brown, Janson*, and Co. The latter afterwards presented the notes to *Martin*, who took them up. The defendants were in the habit of indorsing and paying into their bankers all securities which they received, and of drawing generally on account. *Martin* continued to deal with the defendants from the payment of the notes until his bankruptcy in *October* 1840, and never complained of the transaction, or claimed to set off the money so paid by him against their subsequently accruing demands against him. The precise state of the account between the defendants and their bankers at the time the notes in question were indorsed and handed over to them was not shewn; neither did it appear that *Martin*, at the time of paying the notes, knew the character in which they were presented by the bankers, whether merely as agents or as indorsees or holders for value.

For the defendants, it was contended that the payment of these notes was a voluntary payment by *Martin*, with a full knowledge of all the circumstances, and therefore that the transaction could not be re-opened and the money so paid recovered back; and *Wilson* v. *Ray* (*a*) was cited. There the plaintiff being about to compound with his creditors, the defendant, a creditor, refused to subscribe the deed unless he were paid in full, the plaintiff, to obtain his signature, gave a bill payable to the

(*a*) 10 *A. & E.* 82., 2 *P. & D.* 253.

fendants' agent for the difference between 20*s.* in the und and 8*s.*, the proportion compounded for, the de- dants then signed the deed; the plaintiffs did not ho- ur the bill when due, but on subsequent application he d it, some months after the dishonour, by two instal- nts to the payee, and the defendants received the ney; the other creditors were paid according to the ed. It was held that the plaintiffs could not recover ck the amount paid to the defendants above 8*s.* in the und; for that the transaction had been closed by a luntary payment, with full knowledge of the facts, and ght not to be re-opened; and that it made no dif- rence that the sum in question had not been recovered action.

On the part of the plaintiffs it was submitted that the ndorsees were entitled to recover the amount of the tes; because inasmuch as these had been extorted m the bankrupt in fraud of the other creditors, the bsequent payment of them to the indorsees could not considered as a voluntary payment.

His lordship in leaving to the jury to say whether or the payment by *Martin* was voluntary, told them that ade to the bankers as agents only for the defendants ust be considered as a voluntary payment; and that they thought the payment to have been voluntary with a full knowledge of the circumstances, their dict, upon the authority of the case of *Wilson* v. *Ray*, st be for the defendants, otherwise for the plaintiffs.

The jury having returned a verdict for the defendants,

Sir *T. Wilde*, Serjt. in *Michaelmas* Term last, ob- ined a rule nisi for a new trial, on the ground of isdirection, and that the verdict was against the evi- nce. (*a*)

(*a*) See the grounds on which the rule was moved for, stated, t, p. 404.

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Bompas Serjt. (with whom was *F. Robinson*) in the same term shewed cause. As the court gave no opinion on the point of law, the argument of counsel is not reported. The learned serjeant cited the following authorities. *Cockshott* v. *Bennett* (*a*); *Bilbie* v. *Lumley* (*b*) *Smith* v. *Cuff* (*c*); *Brisbane* v. *Dacres* (*d*); *Farmer* v. *Arundel* (*e*); *Lowry* v. *Bourdieu.* (*g*) *The Duke de Cadaval* v. *Collins* (*h*) and *Kelly* v. *Solari.* (*i*)

Sir *T. Wilde* Serjt., contrà, cited *Smith* v. *Bromley*, contained in a note to *Jones* v. *Barkley* (*k*), *Brownrigg* v. *Morris* (*l*); *Bize* v. *Dickson* (*m*); *Grove* v. *Dubois* (*n*); *Martin* v. *Morgan* (*o*); *Stevens* v. *Lynch* (*p*); *Milnes* v. *Duncan* (*q*); *Tuck* v. *Tooke* (*r*) and *Turner* v. *Hoole.* (*s*)

TINDAL C. J. now delivered the judgment of the court.

This was an action of assumpsit for money paid by the bankrupt to the use of the defendants at their request; to which the defendants pleaded non assumpsit, with two other pleas which it is not material now to consider. At the trial before me at *Guildhall* at the sittings after *Trinity* Term last, it appeared that *Martin*, some time before his bankruptcy, being then in embarrassed circumstances, executed a deed of composition to his creditors, in order to secure the payment of so much in the

(*a*) 2 *T. R.* 763.
(*b*) 2 *East*, 469.
(*c*) 6 *Maule & S.* 160.
(*d*) 5 *Taunt.* 143.
(*e*) 2 *W. Bla.* 824.
(*g*) 1 *Dougl.* 468.
(*h*) 4 *A. & E.* 858., 6 *N. & M.* 324.
(*i*) 9 *M. & W.* 54.
(*k*) 2 *Dougl.* 684.
(*l*) *Cowp.* 790.
(*m*) 1 *T. R.* 285.
(*n*) *Ib.* 112.
(*o*) 1 *Br. & B.* 289.
(*p*) 12 *East*, 38.
(*q*) 6 *B. & C.* 671., 9 *D. & R.* 741.
(*r*) 9 *B. & C.* 437., 4 *M. R.* 393.
(*s*) *Dowl. & R. N. P.* The learned serjeant stated from the private notes of *Tenterden* (which were handed up to the court), that the report of this case was erroneous, stating that the defendants succeeded against the plaintiff on the bills; for the bills were standing in the hands of the parties, who received

pound, and that the defendants, amongst other creditors, executed the deed, but that the defendants, before they would execute, obtained a promise from *Martin* that he would give security for the payment of the whole of their debt. It appeared also that *Martin*, after the execution of the deed in pursuance of such agreement, gave the defendants his promissory note payable to themselves, or order, for the difference between the amount of the composition and the amount of their debt; which promissory notes were indorsed by the defendants, and paid by them into the hands of their bankers at *Leeds*, and afterwards, upon being presented by the *London* correspondents of the *Leeds* bankers the amount of the notes was paid by *Martin*. It was further proved by the defendants, in order to shew that this was a voluntary payment on the part of *Martin*, that he continued to deal with the defendants for three years after this payment of the notes, and never complained of the transaction, or that he attempted to set off the payment against the subsequent demands which the defendants had against him. It appeared, however, on the cross-examination of the defendants' witnesses, that the defendants were in the habit of paying in to their bankers all the securities they received, and drawing on them as they wanted money.

Upon the state of facts the defendants' counsel insisted at the trial that the payment of these notes was a voluntary payment by *Martin* with a full knowledge of all the circumstances, and that, consequently, the transaction could not be re-opened and the money recovered back, referring to the case of *Wilson* v. *Ray* (*a*) as an authority directly in point. And thereupon I left it to the jury to say whether the payment was voluntary or not, telling them, that if the payment was made to the bankers

(*a*) 10 *Ad. & E.* 82. 2 *P. & D.* 253.

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as agents only it must be considered as a voluntary payment; and that if they found the payment to be voluntary and made with a full knowledge of the circumstances, then, upon the authority of the case referred to, they should find their verdict for the defendants, otherwise for the plaintiffs; upon which direction the jury found for the defendants.

In *Michaelmas* term last my brother *Wilde* obtained a rule to shew cause why there should not be a new trial on the ground, first of misdirection; secondly that the verdict was against the evidence. The misdirection complained of was the adopting as law the decision of the court of Queen's Bench in the case before cited; and it was stated by my brother *Wilde* that the main object of his motion was to review the grounds of that decision. The verdict was contended to be against the evidence in the cause, on the ground that the notes having been indorsed by the defendants and paid in to their bankers at *Leeds*, under the circumstances stated, the bankers became the holders of the notes for value, and there was no ground for supposing that *Martin*, knew or indeed could know if the fact were so, that the notes were not presented for payment by them as such holders for value, in which case the payment by him must have been involuntary on his part. And it was further stated that this view of the case was not distinctly left to the jury.

We have heard a very learned and laborious argument on both sides upon the first ground; but as the rule of law laid down by the court of Queen's Bench, if it be not correct, ought rather to be overruled by a court of error than a court of co-ordinate jurisdiction, and as we feel ourselves justified upon the second ground of objection in sending this case to a new trial, and thereby giving either party the opportunity of putting the question of law on the record, we give no opinion

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ıst question. But upon the question of fact we sufficient weight may not have been given by the to the evidence attending the payment of these , whether such payment was voluntary or not; and it would be more satisfactory that this question d be submitted to a second jury with their atten- alled and directed to the precise point,—whether *in* knew that the bankers were presenting the notes ents of the defendants,—which does not appear to been left to them on the former trial.

r these reasons we think the rule should be made ute for a new trial, and that the costs of the former should abide the event of the second.

Rule absolute accordingly.

BLYTH and Another *v.* SMITH.

Jan. 26.

ASSUMPSIT. The declaration, after setting out a contract of charter, dated the 27th of *April* 1837, een the defendant as managing owner of the oner *The Rapid* of the one part, and the plain- and *Thomas Blyth* deceased, freighters of the said l of the other part, whereby that vessel was let on or freight to the said freighters, and stating mutual ıises, alleged that afterwards and in the lifetime *lyth*, and whilst the said vessel so remained in their

In an action by *A.* against *B.*, *B.* gave notice to *C.* against whom *B.* had a remedy over, to come in and defend the action. *C.* refused to do so, but did not prohibit *B.* from con-

ıg the defence. *B.* suffered judgment by default, and watched the proceedings : the writ of inquiry, putting *A.* to the proof of his claim.

: the trial of the action over by *B.* against *C.* the jury included in their ct the costs incurred by *B.* in the former action, no objection being then ı by *C.* to the right of *B.* to recover such costs. The court refused to rb the verdict, being of opinion that there was evidence to go to the jury *C.* had sanctioned the incurring of these costs.

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said service, under and by virtue of the said charter, and on the terms thereof, to wit, on the 24th of *November* in the year aforesaid, the plaintiffs and *Blyth* caused to be shipped at *Port Louis*, in the island of *Mauritius*, on board the said vessel, a cargo of lawful goods and merchandize, to wit, 3348 bags of *Mauritius* sugar, in good order and well conditioned, of great value, to wit, of the value of 12,000*l.*, belonging to *W. Little*, *B. Roberts* and *J. T. Mitchell*, and 283 bags of *Mauritius* sugar in good order, &c., &c. belonging to *R. F. Gower*, *A. L. Gower*, *G. S. Walters* and *E. Gower*, which goods and merchandize for certain freight and reward to be therefore paid to the plaintiffs and *Blyth*, were, for the said respective owners, to be taken care of, and safely and securely carried and conveyed by the plaintiffs and *Blyth*, in and on board the said vessel from *Port Louis* to *London*, and there to be safely and securely delivered in the like good order and well conditioned at *London*, the act of God &c., excepted; that afterwards, to wit, on &c., the said vessel then remaining in the said service of the plaintiffs and *Blyth*, under and by virtue of the said charter, and on the terms thereof, sailed on her said voyage from *Port Louis* to *London*, laden with the said goods and merchandize; that although the plaintiffs and *Blyth* had always observed and performed all things in the said charter mentioned on their part and behalf to be observed and performed, yet the defendant had disregarded his promise in this, to wit, that the said vessel, after the making of the said charter and before the time she so as aforesaid entered into the said service of the plaintiffs and *Blyth* was not made, nor was the said vessel when she so entered into the said service, or at any time afterwards, tight, staunch, or substantial, or in any respect fit or ready to receive on board a cargo of the plaintiffs and *Blyth*; and in this, to wit, that during the continuance of the said

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el in the said service of the plaintiffs and *Blyth* er the said charter party, the said vessel was not l or sufficiently tackled or apparelled, as was usual vessels in the merchant service, or for the execution he aforesaid voyages, nor was the said vessel nor were stores, tackle, or appurtenances kept, as far as was cticable, in good or sufficient repair, although no act of d prevented the said vessel from being made or kept t, staunch, or substantial, or fit and ready to receive said freighters' cargo on board, or well and suffi- ıtly tackled or apparelled, or prevented the said ves- her stores, tackle, and appurtenances, or any of them, n being kept in good and sufficient repair as in the l charter agreed in that behalf as aforesaid; whereby by means of the premises and of the said vessel at time she so as aforesaid entered into the said ser- s of the plaintiffs and of *Blyth*, and from thence con- ıally until and at the time of the said goods and rchandize, to wit, the aforesaid sugar being damaged l destroyed as thereinafter mentioned, not having n made, nor being tight or staunch or substantial, l not by reason or means of any act of God, &c. ge quantities of water, after the said vessel had sailed aforesaid on her said voyage from *Port Louis* for *ndon*, and whilst she was on her said voyage with said goods and merchandize on board as aforesaid, l whilst the said vessel remained in the said service the plaintiffs and *Blyth*, under and by virtue of the l charter, and on the terms thereof, to wit, on the h of *November* in the year aforesaid, penetrated ough the sides and bottom of the said vessel and the ms thereof into the hold of the said vessel, and then l there destroyed a large quantity, to wit, 2000 bags he said sugar, and then and there greatly damaged residue thereof, and thereby the plaintiffs and *Blyth* en became and were wholly unable, safely or securely to

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carry or to convey to *London*, or there safely or securely to deliver in such good order or well conditioned as aforesaid, the said goods or merchandize, or any part thereof, to the said respective owners thereof, and had lost and been deprived of the freight which they would have earned thereby, and they the plaintiffs and *Blyth* thereby became and were answerable to the said respective owners of the said goods and merchandize for the aforesaid destruction and damage thereof, and became and were liable to compensate them for the same; and by means of the premises, not only had the plaintiffs, since the death of *Blyth*, been compelled to pay, and had paid to the said respective owners of the said goods and merchandize, to wit, the said *W. Little*, &c., &c. large sums of money, amounting to a large sum, to wit, 5000*l.* as and for compensations to the said owners respectively for the said destruction and damage of the said goods and merchandize; but also the plaintiffs since the death of *Blyth* had been compelled to pay, and had paid, to the said owners repectively, divers large sums together amounting to a large sum, to wit, 1000*l.* as and for the costs of the said owners respectively in certain actions brought by those owners respectively in H. M.'s court of Queen's Bench at *Westminster*, against the plaintiffs and *Blyth* in respect of the said destruction and damage of the said goods and merchandize, and to recover from the plaintiffs and *Blyth* compensation for the same; and the plaintiffs by means of the premises had also necessarily incurred a great expense, to wit, an expense of 1000*l.* *in and about their defence to the said actions, and in and about the investigating of the circumstances attending the said destruction and damage of the said goods and merchandize.*

The declaration also contained the common indebitatus counts, and a count upon an account stated.

Pleas, *inter alia*—first, non assumpsit, except as to

10s. which was paid into court; and seventhly that laintiffs had not been compelled, nor had they paid ɜ said respective owners of the said goods and mer- lize, the said sum of 5000*l.*, or any part thereof, as for compensation to the said owners respectively, he said destruction and damage of the said goods nerchandize, and the plaintiffs had not been com- l to pay, and had not paid, to the said owners ctively the said sum of 1000*l.*, or any part thereof, d for the costs of the said owners respectively in aid actions brought by those owners respectively, he said purposes in the declaration mentioned, in ıer and form as in the said declaration mentioned; uding to the country. Issue thereon.

the trial before *Tindal* C. J. at the sittings in *Lon-* after the last term, the following facts appeared:— *Rapid* sailed from *London* under the charter set n the declaration, in *May* 1837, and arrived at *Mauritius* on the 5th of *August*. She then under- an intermediate voyage to the *Cape of Good Hope;* which, namely, in *November*, she was put up, by the tiffs' house at the *Mauritius*, as a general ship for *lon*, and amongst other goods, received on board 3 bags of sugar for *Rickards*, *Little* and Co., and bags for *A. A. Gower*, Nephews and Co. On the of *December*, the vessel sailed from the *Mauritius*, in a few days she was compelled to return in a dis- d state, and to unload. Part of the sugars, amount- to 979 bags, were found damaged and being unfit re-shipment were sold. After being repaired at the *ritius*, she sailed for *London* on the 7th of *February* 8 with the residue of her cargo, and arrived there he 22d of *May*.

ickards and Co. and *Gower* and Co. having com- ced actions against the present plaintiffs to recover value of the sugars so sold at the *Mauritius*, the

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solicitors of the plaintiffs sent to the defendant the following notice: —

"*January* 24th, 1839.

"Ship *Rapid.*

"Gentlemen, — We are instructed to give you notice that Messrs. *Little* and Co. (*Rickards* and Co.) have commenced an action against Messrs. *Blyth*, the charterers of the above ship, in H. M. court of Queen's Bench, to recover damages for the non-delivery of certain goods and merchandize shipped by the plaintiffs on board the said ship at the *Mauritius*, to be carried and conveyed therein to *London*. The plaintiffs allege in and by their declaration in their said action, that the delivery of the said goods was not prevented by the perils of the seas, and indeed you are aware that the ground of the said action is the alleged unseaworthiness of the said ship. Under these circumstances, and as in case of the plaintiffs' recovery against the said charterers in the said action, the latter would have recourse to you as the owners of the said ship, for all such damages, we do hereby invite you to take upon yourselves the defence of the said action, and do give you notice that the defendants will hold you responsible at law for all damages, loss, costs, charges, and expenses to be by them sustained in or relating to the same."

Shortly afterwards the defendant was furnished with copies of the particulars of the claims respectively made by Messrs. *Rickards*, *Little* and Co. and Messrs. *Gower* and Co. On the 19th of *February* 1839, the plaintiffs' solicitors wrote again to the defendant to inquire whether he intended to settle the foregoing claims, or to defend the actions. On the 22d they received from the defendant's attorney the following answer: —

"I am instructed by my client to say that he declines to take up the defence of Messrs. *Blyth* to the actions

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nst them by Messrs. *Rickards* and Co. and *er* and Co."

became necessary to plead, the defendant d notice, and was required to furnish evi- wer to the actions. The plaintiffs not ob- requisite assistance, and being advised that defence to offer, suffered judgment to go nd upon the execution of writs of inquiry, ies to the proof of their respective claims. *tards* and Co. recovered 1503*l.* and 58*l.* nd Messrs. *Gower* and Co. 110*l.* 4*s.* and for costs; which sums the plaintiffs paid ght to recover, together with the costs in- isting the two actions.

having found for the plaintiffs, damages

on a former day in this term, obtained a a new trial, or to reduce the verdict to nages (*a*), or, by the amount of the costs the plaintiffs in defending the two actions, ntended the plaintiffs could not claim from it.

Serjt. (with whom was *Bovill*) now shewed to the objection that the plaintiffs cannot costs incurred by them with respect to the brought against them, this case is clearly dis-

ground that by he charter party the shipper was rs, and not with ; and, conse- having paid mo- y were not legally they had paid it in their own wrong, and could not recover it from the defendant. On the argument, however, the court held, that this point was not open to the defendant, it not having been taken at the trial.

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tinguishable from the case of an accommodation acceptor. For as he is clearly liable to the holder for an ascertained amount, he is not justified in putting the drawer to any costs in recovering upon the bill. Here, the damages were unliquidated; and having suffered judgment by default, the plaintiffs were bound to appear at the execution of the writs of inquiry and put the parties to the proof of their claims. The course taken by the plaintiffs was a reasonable and proper one throughout. They gave the defendant notice of the actions, and offered to place the defence in his hands, and on his refusal, adopted the course which appeared to be most beneficial to the defendant.

Shee Serjt. (with whom was *Cleasby*) in support of the rule. It is submitted that the defendant is not liable to the costs of defending the actions; for such costs are not a necessary consequence of any breach of contract by the defendant. In *Short* v. *Kalloway* (*a*), it is said by Lord *Denman*, "No person has a right to inflame his own account against another, by incurring additional expense in the unrighteous resistance to an action which he cannot defend. The circumstance relied on, that the damages were unliquidated, makes no difference." [*Tindal* C. J. You would have had just ground of complaint if the plaintiffs had proceeded to trial without giving you notice. But the course adopted was for your benefit, and the defendant had the opportunity at any time of coming forward, and undertaking the defence.] If the plaintiffs have incurred costs unnecessarily, the defendant cannot be held liable to repay them. [*Erskine* J. You must shew that the defence was unreasonable.] In *Penley* v. *Watts* (*b*), *A.* leased premises to *B.* from the 25th of *March* 1823, for sixteen

(*a*) 11 *A.* & *E.* 28. (*b*) 7 *M.* & *W.* 601.

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years wanting ten days, and *B.* covenanted with *A.* to keep the premises in repair, and to paint once in every five years of the term, and to leave the premises in repair. *B.* underleased the premises to *C.* from the 24th of *June* 1834, for four years and three quarters, wanting eleven days, and *C.* covenanted with *B.* to keep the premises in repair (the covenant so far being in the same terms as in the original lease), and to paint once during the term, and to leave the premises in repair. *A.* sued *B.* for breaches of this covenant, and *B.* let judgment go by default, and upon the writ of inquiry the damages were assessed at 64*l.* 10*s.*, being the amount of dilapidations proved by a surveyor, whose estimate had been laid before *B.* previously to the commencement of the action. *B.* afterwards sued *C.* for the amount of the dilapidations, and the costs of the action brought against him. The jury found the amount of dilapidations to be 57*l.* 10*s.*, and it was held (in effect overruling *Neale* v. *Wyllie* (*a*)), that *B.* was not entitled to recover also the amount of the costs in the former action. And *Parke* B. said "The only true measure of damages here is what it would have cost the defendants to put the premises in repair. If the plaintiffs have expended more, that is their own fault, for which the defendants are not liable." That case shews, that however hard it may seem, if a man defends an action and incurs costs, he cannot recover them. [*Tindal* C. J. There, the plaintiffs themselves had broken the covenant into which they had entered to keep the premises in repair.] So in *Walker* v. *Hatton* (*b*), it was held that the plaintiff was not entitled to recover from the defendant the costs of defending the action, as they were not necessarily occasioned by the defendant's breach of

(*a*) 3 *B.* & *C.* 533., 5 *D.* & *R.* 442.

(*b*) 10 *M.* & *W.* 249.

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the covenant to repair. These cases put an en distinction between ascertained and unliquida mages. [*Maule* J. Was this point made at th *Channell* Serjt. No. *Tindal* C. J. (referring to respondence), After the letters that passed betv parties, was it unreasonable for the plaintiffs the course they did?]

TINDAL C. J. The only question now befo whether there was any evidence for the jury in point had been made at the trial, to shew th costs were incurred with the sanction of the de He receives notice of the actions, and is in undertake the defence; and although he refus so, he does not at all prohibit the plaintiffs from ing. Under the circumstances of the case ve evidence would have satisfied the minds of the j the defendant consented to the course adopte plaintiffs.

ERSKINE J. I think that the authorities whi been cited are by no means conclusive.

MAULE and CRESSWELL JJ. concurred.

Rule disc

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BEECH *v.* Sir JAMES EYRE, Bart.

Jan. 26.

A private act passed to enable a manufacturing company to purchase certain patents, and to sue and be sued, enacted, that in all actions, &c. to be instituted or prosecuted against the company, "*it should be sufficient* to state the name of the secre-

ASSUMPSIT for goods sold and delivered. Plea, non assumpsit.

At the trial of the case before *Tindal* C. J. at the sittings in *London* after last *Michaelmas* term, it appeared that the defendant was an original subscriber and shareholder in a company established under the 5 *Vict. c.* lxxxix., being "An act to enable the Patent Rolling and Compressing Iron Company to purchase certain letters patent, and to sue and be sued." The patents were two in number, one, for "certain improvements in machinery for the making or manufacturing of pins, bolts, nails and rivets applicable to various useful purposes," and another "for improvements in rolling iron."

y or some one of the directors, or where there shall be no secretary or ector, then the name of some one of the shareholders, for the time being, the company, as the nominal defendant representing the company in such ceedings," and provided for the reimbursement, &c. of shareholders who ght be sued "in any other manner than under the powers and authorities reinbefore given," and enacted, "that nothing therein contained should extend incorporate the company or to relieve or discharge the company, or any of the reholders thereof from any responsibility, duty, contract, or obligation whatr to which by law they then were or at any time thereafter might be subject liable, either as between such company and other parties, or as between the npany and any of the individual shareholders thereof and others, or as between mselves, or in any manner whatever."

Held, that the act was not imperative upon a creditor to sue in the manner nted out, but that he might exercise his common law right of proceeding inst any individual shareholder.

The defendant was a party to a contract in *February*, for procuring the which was obtained in *June*, and his name appeared in it as a subscriber the undertaking, and in *September*, he executed a deed of settlement, which ited that the company was in operation. The goods in respect of which the ion was brought were supplied in *July*. Held, that there was sufficient idence from which the jury might infer that the defendant was a partner at the e the goods were furnished.

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The fifth section enacts "that in all actions, suits and other legal proceedings other than proceedings of a criminal nature &c., to be thereafter instituted or prosecuted by or on behalf of the said company, either alone or jointly with any other necessary parties, it shall be sufficient to state and to proceed in the name of the secretary, or one of the directors for the time being of the company, as the nominal plaintiff representing the company in such proceedings; and that in all actions, suits and other legal proceedings to be thereafter instituted or prosecuted against the company, either alone or jointly with any other necessary parties, *it shall be sufficient* to state the name of the secretary or some one of the directors, or where there shall be no secretary or director, then the name of some one of the shareholders for the time being of the company, as the nominal defendant representing the company in such proceedings: Provided always, that any party suing the company may, if he think fit, join any shareholders of the company together with such nominal party, as defendants in equity, for the purpose of discovery, or in case of fraud."

By the twelfth section "it shall be lawful for the plaintiff to cause execution upon any judgment, decree, or order obtained by him in any such action or suit against any such nominal party as aforesaid, to be issued against all or any of the shareholders, for the time being, of the company; and if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby, then it shall be lawful for him to cause execution to be issued against any person who was a shareholder of the company at the time the contract was entered into upon which such action or suit shall have been instituted."

By the seventeenth section, it is provided "that in case any action, suit, or other proceeding, in respect of any

ainst the company, shall be instituted or pro-
inst any shareholder, or former shareholder,
pany, in any other manner than under the
authorities hereinbefore given, and in case
nolder shall, by virtue of any judgment or
such action, suit, or other proceeding, or
execution to be issued in respect thereof,
e, pay any sum of money, damages, costs, or
ie shall, in respect of such last-mentioned
ie entitled to all such indemnities, rights,
l remedies in all respects, for reimbursing
for enforcing contribution, according as the
e, in respect of all moneys, damages, costs,
so paid by him as aforesaid, as are herein-
n in cases where execution shall have issued
udgment or decree obtained in any action,
er proceeding instituted or prosecuted under
given by this act."

20. the company were required, within six
r the passing of the act, to cause to be in-
ancery a memorial of the names, residences,
tions of the directors and secretary for the
of the company, and of the shareholders

24. it is provided, "that until the first me-
have been duly inrolled in manner by this
, no action or other proceeding by or against
y shall be commenced or prosecuted under
y of this act."

31. nothing in the act contained shall extend
ite the company, or to relieve them or any of
lders thereof from any responsibility, duty,
obligation whatever to which by law they are,
ne hereafter, may be subject or liable, either
the company and other parties, or as
e company or any individual shareholders

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thereof and others, or as between themselves, or in any other manner whatsoever.

The original deed of contract, dated the 9th of *February* 1841, for obtaining the act of parliament, was put in, executed by the defendant, who had subscribed his name for 100 shares of 25*l.* each, on which he had paid a deposit of 5*l.* a share. The deed contained a covenant by the subscribers to pay the residue of their subscriptions when they should be called upon to do so. In pursuance of this deed, the act of parliament, which received the royal assent on the 21st of *June*, was obtained. A deed of settlement, bearing date the 18th of *September*, was also given in evidence, executed by the defendant, which, after reciting the former deed, and that the act had been obtained, stated that the company had taken premises at *Rotherhithe*, for carrying on business, had erected machinery, and was in actual operation. It was proved that the defendant had attended several meetings of the company in *March* and *April* 1842.

There was no evidence that the company had purchased the patents mentioned in the act. Directors and a secretary had been appointed, but the memorial required by the act was not inrolled until the six months specified by the act had expired, and consequently was not received in evidence. The goods in respect of which the action was brought, consisting of tallow for the machinery, had been ordered by the secretary, and were supplied in *July* 1841.

For the defendant it was contended that inasmuch as no memorial had been inrolled within the six months as required by the twentieth section, the act became inoperative, and the company was an illegal body; but that supposing the company to be properly formed, still the only mode of suing the company was that prescribed by the fifth section.

Under the direction of the Lord Chief Justice a verdict was found for the plaintiff for 28*l.* 0*s.* 9*d.*, leave being reserved for the defendant to move to enter a nonsuit.

Bompas Serjt., on a former day of this term, moved accordingly; citing *Steward* v. *Greaves* (*a*); where it was held that the creditor of a banking copartnership established and carrying on business under the 7 *G.* 4. c. 46., cannot sue an individual member of the company for his debt, but must proceed against the public officer, pursuant to the ninth section of the act. A rule nisi having been granted,

Channell Serjt. (with whom was *W. H. Watson.*) The only point on which the defendant had leave to move, was whether he could be sued as an individual shareholder. There is nothing in the fifth section of the act establishing the company, to render it imperative on third parties to sue the company in the name of the secretary, or of one of the directors. That section, for the sake of public convenience merely empowers the company, if they think proper, to sue for debts due to them in the manner pointed out, but without making it at all obligatory upon them to do so. While on the other hand, third parties are authorised to sue the company in the name of the secretary &c., if they think fit to adopt that course. The words that in actions against the company, "it shall be *sufficient* to state the name of the secretary" &c. shew, that the clause was meant to be optional. In order to take away the common law right to sue any individual partner of the concern, distinct and precise language must be used. The subsequent clauses of the act all tend to the con-

(*a*) 10 *M.* & *W.* 711.

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clusion that this right to sue individual members was not meant to be abrogated. The twelfth and seventeenth sections plainly contemplate the case of shareholders being sued otherwise than in the mode pointed out by the act. The twenty-fourth section, which provides that until the memorial is inrolled, no action shall be brought by or against the company, under the authority of the act, is relied on as shewing that the company is not legally constituted, no such memorial having been inrolled; but that clause does not render the company less a company, although it may suspend, or deprive them of, part of their intended privileges; and even supposing it rendered the partnership no longer a company, it has no effect upon the partnership itself, or upon the liabilities of the individual members. If it had, in what a situation would the public be placed, supposing the company, after having dealt with parties and obtained goods from them, were to choose not to inrol any memorial. If any doubt existed as to the construction of the other clauses, the thirty-first section (which provides that nothing contained in the act shall relieve the company or any of the shareholders from any responsibility to which by law they are or at any time hereafter may be subject or liable) seems decisive upon the point. *Steward* v. *Greaves* (*a*) which was cited when this rule was obtained, is distinguishable from the present case. The words of the ninth section of the 7 *G.* 4. *c.* 46. upon which the former case was decided, are that "all actions against the copartnership *shall*, and lawfully may, be commenced, instituted and prosecuted against one or more of the public officers nominated as before mentioned as the nominal defendant," and *Parke* J. in delivering the judgment of the court said. "These words, according to the ordinary import,

(*a*) 10 *M.* & *W.* 711.

are obligatory, and ought to have that construction, unless it would lead to some absurd or inconvenient consequence, or would be at variance with the intent of the legislature to be collected from other parts of the act." *Blewett* v. *Gordon* (*a*) is a distinct authority for the plaintiff. It was there held, upon the words of a private act of parliament establishing the *Monmouthshire* Iron and Coal Company, containing clauses nearly similar to the act under consideration, that it was not imperative upon a plaintiff to sue the secretary or one of the directors of the company, and that a plea raising the point was not an issuable plea.

It is now attempted to be said that if the defendant cannot be sued under the act, there is no evidence to fix him as a partner at all. It is submitted that this point cannot be raised by the defendant, as it was not taken at the trial; but that if it can, the evidence was abundantly sufficient. In the deed of contract of the 9th of *February* 1841, the defendant holds himself out as one of a number of persons associated together for trading purposes. And with respect to the deed of settlement, though entered into after the supplying of the goods, it contains recitals of past events, by which it appears that the company had taken premises at *Rotherhithe*, had erected machinery there (for the use of which the tallow was supplied), and was in operation. In addition to these documents, there is the fact of the defendant having subsequently attended several meetings. It is impossible to say, that there was no evidence for the jury, of the defendant being a member of the company; and there can be no doubt that if the point had been raised at the trial, the jury would have distinctly found the fact.

(*a*) 1 *Dowl. N. S.* 815.

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Bompas Serjt., in support of the rule. It is submitted that there was no evidence to fix the defendant as a partner at the time these goods were supplied, *if* he cannot be held liable under the act of parliament, which, it is clear, he cannot. [*Tindal* C. J. I do not see why the act is not to be appealed to, notwithstanding the company had not put themselves in a situation to render its provisions available. *Erskine* J. You must go the length of contending that there was no evidence for the jury.] It is not denied that the defendant was a party to the obtaining of the act; and if it had been shewn that the company had carried on business under the patents it might have been evidence. But the act was procured for a particular purpose, namely, to buy the patents, and the defendant can only be held responsible for things done in pursuance of the act. It is clear, that if the directors had done something not warranted by the act, the defendant would not be liable. [*Tindal* C. J. Who do you say should have been sued for this tallow?] The party who ordered it. It is contended that at that time the defendant was not a partner at all. [*Tindal* C. J. The tallow was ordered for the machinery.] But the patents had not been purchased. [*Maule* J. Suppose they had not, do you contend that their purchase was a condition precedent to carrying on the company? You assume that till the patents are bought the company cannot be sued, but there is nothing to that effect in the act. The third section seems to contemplate that some time may elapse before the patents are purchased. *Erskine* J. Was not the deed of settlement, reciting that the company had taken premises, erected machinery &c., coupled with the fact as shewn by the deed of contract that the defendant was a party to the obtaining of the act, evidence of his being a partner?] The deed of settlement, contains no recital that the patents had been purchased,

t only that a company had been formed to purchase
:m. [*Cresswell* J. That deed states that the company
in operation; which shews that the patents had then
en purchased, or if not, it is an admission, under the
nd and seal of the defendant, that the company might
in operation before they were bought.] If the order
· the goods had been after the execution of the deed
settlement, it would be difficult to say that the de-
ıdant was not liable; but it is submitted that there is
evidence that the defendant was a partner at the
ıe the goods were ordered; neither does the evidence
ıt he attended several subsequent meetings of the
mpany establish that fact.

Supposing the company to be legally in existence,
en the plaintiff was bound to sue in the manner pre-
ribed by the fifth section; for it was proved that
ere were both a secretary and directors; and an in-
vidual shareholder can only be sued as a defendant
presenting the company. The proviso to that sec-
on shews that the clause was meant to be imperative;
ır if not, the insertion of such proviso would have
een quite unnecessary. If the fifth section is held to
e optional, one of the principal objects in obtaining
ıe act, which was to protect the individual share-
)lders, by giving the public a convenient mode of
'oceeding against the company, would be defeated.

Tindal C. J. This is an action brought against the
fendant charging him, as a partner in a trading com-
ny, with certain goods supplied to that company.
wo objections have been taken against the plaintiff's
ght to recover: first, that by the act of parliament
tablishing the company, the right of suing any indi-
dual shareholder is taken away, as all actions must be
'ought in the manner thereby prescribed; and, se-
)ndly, that supposing the act not to apply, there was

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no evidene to shew that the defendant was a partner *in* the undertaking. With respect to the first question *it is* incumbent on the defendant to make out that the common law right of suing is taken away in express terms. So far however, from that being the case, it seems to me, that the fair construction of the act is, not only that the right to sue is not taken away, but that it is distinctly reserved. The fifth section (*a*) does not state that in actions against the company parties *shall* sue, but only that "it *shall be sufficient* to state" &c., evidently shewing that the clause was merely meant to confer a power or privilege, but not to impose an obligation. By the twenty-fourth section, this power cannot be exercised unless a memorial has been inrolled pursuant to the provisions of the twentieth clause, which is an act to be done by the company. Supposing the company not to file any memorial, as indeed was the case, are the rights of third parties to be affected by a condition to be performed by the company with which they have not thought proper to comply? On referring to the twelfth and seventeenth sections (*b*), it clearly appears that the right of third parties to sue individual members of the company, is distinctly reserved; for both of these clauses contemplate that the case may occur of actions being brought against individual shareholders. I think, therefore, that the first objection falls to the ground.

With respect to the second objection, I agree that in order to charge the defendant it must be shewn that he was a partner at the time when the goods were supplied. In the first place it has been contended that the company could not be legally constituted until the patents were purchased; but it does not appear to me, that the act contains any words making the buying of the patents a condition precedent. But even if that had

(*a*) *Antè*, p. 416. (*b*) *Antè*, p. 416, 417.

en so, no objection was taken before me at the trial, at the patents had not been purchased. On the con- ary, it seemed to be assumed that the company were rrying on business under the act. With respect to the idence, it is sufficient to say, that there was some evi- nce to go to the jury, that the defendant was a partner hen the goods were supplied. The act was passed on e 21st of *June* 1841, and we find that in the preceding *ebruary*, the defendant enters into a contract to procure e act, and his name appears therein as a subscriber r shares in the capital of the company. We find him, terwards, in *March* and *April* 1842, attending meetings the company, having previously signed the deed of ttlement which recites that the company is in operation. not all this evidence that he was a partner from the st commencement of the works? There was clearly idence from which the jury might infer that he was, om the first, a shareholder in the company.

ERSKINE J. This is an action for goods sold and livered, in which the defendant by his plea simply de- s his liability. It is sufficient therefore for the plaintiff shew that the goods were supplied either to the de- dant individually, or to some partnership of which he s a member. It appears that the goods were de- ered at *Rotherhithe* upon the premises of a company ling itself "The Patent Rolling and Compressing on Company," and the question is, whether, at the ne of the delivery of the goods, the premises were tually occupied by the company, and whether the de- ndant was then a member thereof. In order to make at out, a deed of settlement dated in *September* 1841, d executed by the defendant, was put in, which ecites, among other things, that premises had been taken or the company, and adapted for the purpose of carry- ng on business, that machinery had been erected, and

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that the company was in operation. Then it appears that he had been in the preceding *February* a party to an agreement for obtaining the act; that in pursuance of such agreement, the act was procured; and his name appears in the act as a subscriber to and partner in the company. We are asked to say, that these facts afford no evidence from which a jury might infer that the defendant was a partner in the company in *July*, when the goods were furnished. It appears to me not only that there was evidence for the jury of the defendant being then a shareholder, but that if they had come to any other conclusion, their verdict would have been so unsatisfactory as to warrant the court in sending the cause down again.

The next question is, whether there is any thing in the act which deprives the plaintiff of his right to sue the defendant. It is said that the company was formed for the purpose of purchasing certain patents, and carrying on business under them; and that the sole object of the act was to authorise them to do so; and that unless the plaintiff could shew that the company had bought the patents, he had not proved the defendant a partner in a firm then carrying on business. It appears to me that there is nothing in the act making the purchase of the patents a condition precedent. Then, it is contended that the act prevents the plaintiff from suing the defendant in his individual capacity, for that by the fifth section all actions must be brought against the secretary or one of the directors of the company, &c., and it was proved that the company had both a secretary and directors. If this clause had said, that the company *shall* be sued in the name of the secretary, &c., and there had been nothing in the other sections to shew that the legislature had used the word "shall" in any other than its imperative sense, then the case would have fallen within the decision in *Steward*

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. But here the words merely are that "it fficient;" leaving it therefore optional so to sue t is contended that the proviso to the fifth shews that this is not the true construction se; for the power thereby given of joining any r shews that it was requisite on all occasions her the secretary or one of the directors, as the proviso would be superfluous. It seems vever, that the object of that proviso merely le a plaintiff to join any of the shareholders minal defendant, in cases where it may be ne- bring them personally before a court of equity. re, the case had rested on the fifth section ould have thought that there was nothing to the common law right of the plaintiff to sue ant. But by the seventeenth section, the legis- rly contemplates the case of a party bringing against an individual shareholder in some anner" than under the authority of the act. en we look at the thirty-first clause, we see gislature seems to have been curiously anxious e away the common law responsibility of the members of the company. It therefore me, that the act leaves the case as it stood at w, and that as the liability of the defendant er was proved, this rule must be discharged.

nd *Cresswell* Js. concurred.

Rule discharged.

(*a*) *Antè*, p. 416.

Jan. 25. BIFFIN and Another, Assignees of GEORGE YORKE, an Insolvent, *v.* JOSEPH YORKE.

Money levied under a cognovit not filed, and upon which no judgment has been signed within twenty-one days, is void as against assignees of an insolvent, although the cognovit was given in a suit commenced adversely, and although the proceeds of the execution are paid over to the judgment creditor before the insolvency.

DEBT, for money had and received, and upon an account stated. Plea: nunquam indebitatus. The action, commenced on the 6th of *May* 1842, was brought for the purpose of recovering 207*l.* 7*s.* 2*d.*

By an order of *Maule* J., the following case was stated for the opinion of the court: —

On the 21st of *December* 1840, an action was adversely commenced in the Exchequer, against the insolvent *George Yorke*, by the present defendant, upon *G. Yorke*'s dishonoured promissory note given for money and goods. On the 1st of *January* 1841, and before the present defendant had declared in that action, *George Yorke* being then in insolvent circumstances (but which was not then known to the present defendant), gave to the present defendant a cognovit authorising him, in case default should be made by *George Yorke* in payment of the sum of 300*l.* (being the debt in that action), with interest thereon at 5 per cent., together with costs, on the 7th of *January* 1841, to enter up judgment for 300*l.* and interest and costs, and also the costs of entering up such judgment, and of suing out execution thereon, and thereupon forthwith to sue out execution for the same, together with officer's fees, sheriff's poundage, costs of levying, and all other incidental expenses. The cognovit was not, nor was any copy thereof, filed, (as required by the 3 *G.* 4. *c.* 39. and 1 & 2 *Vict. c.* 110.) until the 1st of *February* 1841.

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Judgment was signed on the cognovit upon the 26th of *January* 1842, on which day a *fieri facias* issued, directed to the sheriff of *Sussex*, indorsed to levy 324*l.* 4*s.* 6*d.*, and interest thereon at 4 per cent. from the 22d of *January* 1842 till paid, with 1*l.* 1*s.* for the writ. Under this writ the now defendant caused certain goods of *G. Yorke* to be seized and sold. The seizure was made on the 7th of *February* 1842, and the sale took place on that and the two following days. The gross proceeds of the sale amounted to 207*l.* 7*s.* 2*d.*, which amount was applied in the following manner: 31*l.* 4*s.* 1*d.* was paid in discharge of assessed taxes; 35*l.* 4*s.* 6*d.* was retained for charges, and the remainder, 140*l.* 18*s.* 7*d.*, was paid to the present defendant. After the sale *Sherwood*, one of the present plaintiffs, brought an action against *George Yorke*, in which judgment was suffered by default. On the 14th of *April* 1842, *George Yorke* was taken under a *ca. sa.* at the suit of *Sherwood*. On the 15th of the same month *George Yorke* went to *Horsham* gaol, and continued a prisoner for debt in such gaol until the 22d of *July* 1842, when he was discharged according to the provisions of the 1 & 2 *Vict. c.* 110.

George Yorke signed his petition under that statute on the 21st of *April* 1842, and filed it on the following day. The vesting order was dated the 23d of the same month, and on the 30th the plaintiffs were appointed assignees. *George Yorke*'s schedule was filed on the 14th of *May*, and his petition was heard on the 22d of July 1842. The appointment of the plaintiffs as assignees, and all the other proceedings, were made and heard under the provisions of the 1 & 2 *Vict. c.* 110.

The character of the plaintiffs as assignees, as stated in the declaration, is admitted; and it is admitted that they became such assignees on the 30th of *April* 1842.

The question for the opinion of the court is, whether,

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under the sixtieth section of the 1 & 2 *Vict. c.* 110., t
plaintiffs are entitled to recover the 207*l.* 7*s.* 2*d.*, or a
part thereof, from the present defendant. If the cou
shall be of opinion that the plaintiffs are entitled to r
cover from the defendant the same or any part there
judgment is to be entered for the plaintiffs, by co
fession, for the whole or such part as the court sh
think them entitled to recover; but if the court sh
think that the plaintiffs are not entitled to recover a
part of the said sum, judgment is to be entered for t
present defendant by *nolle prosequi.*

Bompas Serjt. (with whom was *Montague Chambe*
for the plaintiff. By the 3 *G.* 4. *c.* 39. *s.* 2., every warra
of attorney, and the judgment execution thereon, a
declared to be fraudulent, unless the warrant of attorn
or a copy thereof has been filed within twenty-one da
pursuant to the directions of sect. 1., or unless judgme
has been signed or execution issued within the sam
period. By sect. 3., these provisions are extended t
cognovits. The 1 & 2 *Vict. c.* 110. *s.* 60. places the a
signees of insolvent debtors upon the same footing a
the assignees of bankrupts with respect to both thes
species of securities. The only thing material in thi
case is, that the cognovit given by the insolvent was no
filed, nor was any judgment entered up thereon withi
the twenty-one days. It does not appear that any ca
has yet arisen in which the property taken in executi
under a judgment signed upon a warrant of attorney
a cognovit, had been converted into money; but t
words of the statute are, "*moneys levied* or effe
seized." In *Dillon* v. *Edwards* (*a*), it was held that
action of trover lay against the sheriff at the suit of
assignees of a bankrupt, where goods had been taken

(*a*) 2 *M.* & *P.* 550.

execution under a judgment signed upon a warrant of attorney not duly filed. It is true that, in *Wilson* v. *Whitaker* (*a*), a doubt is thrown out by *Abbott* C. J., whether the 3 *G.* 4. *c.* 39. extends to cases where no act of bankruptcy has been committed at the time of the execution of the warrant of attorney. No question can however arise in the case of an insolvent debtor as to sums levied before an application to the court for his discharge. In *Hurst* v. *Jennings* (*b*), the court on the application of the assignees of a bankrupt, ordered an execution to be withdrawn which had been issued on a judgment signed upon an instrument in the nature of a cognovit which had not been filed within the prescribed period. The case of *Everett* v. *Wells* (*c*) is in some respects stronger than the present. There, the petitioning creditor's debt had no existence either when the warrant of attorney was given or when the twenty-one days expired; and it was contended that it could not have been the intention of the legislature to protect persons who were not creditors at the time the security was given. But the court refused to recognise any such distinction. The cases shew that, as against assignees, warrants of attorney and cognovits not duly filed, and not followed by judgment within twenty-one days, are absolutely void. It has been suggested that the judgment of the court in *Dillon* v. *Edwards*, and that of Lord *Tenterden* in *Hunt* v. *Jennings*, shew that this is not so.

Channell Serjt. (with whom was *Barstow*), contrà. However strong the language of the statutes may be, it is hoped that the court will pause before they extend their provisions to the case of a cognovit given in an

(*a*) *Mood. & Malk.* 8.
(*b*) 5 *B. & C.* 650., 8 *D. & R.* 424.
(*c*) *Antè*, Vol. II. p. 269., 2 *Scott, N. R.* 525.

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action commenced adversely where the plaintiff may have been totally ignorant of the insolvency of the party whom he is suing. Here, both these facts are expressly stated and the money was paid over before the insolvent went to prison. The question is this, whether, when a party neglects to file a cognovit within twenty-one days his execution may be defeated by a subsequent insolvency, however remote the period of that insolvency may be; and whether, in such a case, assignees may disturb by-gone transactions of the most *bonâ fide* character, unless they are protected by the lapse of six years under the statute of limitations. The only mode of avoiding the extreme inconvenience arising from such a construction appears to be, to hold that the statutes in question do not apply when the money is actually levied before the committing of the act of bankruptcy, or the filing of the petition under the insolvent debtors' act. Except in cases of voluntary conveyance, provided for by the fifty-ninth section of 1 & 2 *Vict. c.* 110., the assignees of an insolvent take the property *from the time of the imprisonment.* For the excepted cases there is an express provision; but that provision is for the excepted cases only, and does not entitle the assignees in other cases to go back to a period anterior to the imprisonment. No case has been decided upon the sixtieth section of the 1 & 2 *Vict. c.* 110. The cases cited on the other side arose upon the bankrupt laws. None of these decisions affect the point for which the defendant is contending otherwise than as containing dates which are in the defendant's favour. In *Dillon* v. *Edwards* it appeared clearly that the goods were in the disposition of the bankrupt at the time of the commission. The same observation applies to the case of *Hurst* v. *Jennings.* Either this is a cognovit or it is a device to avoid the statute. The same observation would apply to *Everett* v. *Wells,* which was the case of an unsatisfied

judgment, and not a lien, or a case of payment over of the proceeds of an execution. The opinion of *Abbott* C. J. in *Wilson* v. *Whitaker* is in favour of the defendant. That learned judge says: "If it were necessary to consider what might be the effect of such a warrant of attorney judgment and execution as the present *when the execution had been executed before any act of bankruptcy*, I should be very unwilling to decide that question here. Even such a case would satisfy the *words* of the statute 3 *G.* 4.; but it is necessary to affix a reasonable construction to a statute; and the inconvenience consequent on extending it to cases where there had been no act of bankruptcy might be very great; since, in that case, a warrant of attorney might be given without the requisite formalities, and judgment signed and execution issued upon it even before the party was at all in trade, and all these proceedings would subsequently become void." The same point was argued, but not decided, in *Brook* v. *Mitchell* (*a*); *Everett* v. *Wells* is differently reported in *Scott* and in *Mann. & Gran.* According to the former report, Mr. *J. Erskine* appears to have pointed out a difference between a judgment executory and a judgment executed; but no such expression is to be found in *Mann. & Gran.*; and it would have been wholly unnecessary with reference to the question then before the court. [*Tindal* C. J. The observation supposed to have been made would have been correct if limited to the matter then before the court. *Erskine* J. I had in view only the case then argued.] It is necessary to look at the state of the law. The 6 *G.* 4. *c.* 16. *s.* 81. contains a similar proviso to that in the 49 *G.* 3. *c.* 121. Formerly the title of assignees had, in all cases, relation to the act of bankruptcy, and an execution levied after an act of

(*a*) 6 *New Ca.* 349., 8 *Scott*, 332.

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bankruptcy would have been treated as a seizure of t property of the assignees. That was remedied in ca of *bonâ fide* dealings with the bankrupt. [*Cresswell* Is it meant to be contended that the provisions of t 3 *G.* 4. *c.* 39. do not apply to cases that are within t 49 *G.* 3. *c.* 121.?] If, before the passing of the 3 *G.* *c.* 39., the plaintiff had levied, he would have been pr tected by the 49 *G.* 3. *c.* 121. The court are asked put a construction upon the second section of t 3 *G.* 4. *c.* 39., which would give rise to an inconvenien [*Tindal* C. J. If any inconvenience arises to the pla tiff, it is one of his own seeking.] So far the case h been considered as if it were a case of bankrupt The provisions of the 1 & 2 *Vict.* *c.* 110. *s.* 60., with spect to insolvent debtors, are, however, much the sa as those of the 3 & 4 *G.* 4. *c.* 39. *ss.* 2, 3., relating bankrupts.

Bompas Serjt., in reply. *Brook* v. *Mitchell* was n referred to because it was not considered to be in poin The decision there turned upon the peculiar circum stances of the case. The concluding words of the Lor Chief Justice do not imply that an action could not ha been brought. The question in that case was, whethe the matters sought to be impugned, were really *bonâ fi* transactions. *Tindal* C. J. asks, "How can an exec tion against an act of parliament, be *bonâ fide?*" "money levied" is to be recovered, it must be mon levied before the imprisonment. The case of *Everett* *Wells* resolves the doubt expressed by *Tindal* C. J. i *Brook* v. *Mitchell.*

TINDAL C. J. It has now become necessary to decid a point brought before the court in *Brook* v. *Mitchell*, i which case an objection to the proceedings of the judg ment-creditor upon another ground, was allowed prevail. Though the case now before the court ari

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under the insolvent debtors' act, of the 1 & 2 *Vict.* *c.* 110., the decision must turn upon the terms of the bankrupt act of 3 *G.* 4. *c.* 39.; and the question is, whether money levied under an execution issued upon a judgment signed on a cognovit and actually paid over to the judgment-creditor before the imprisonment of the debtor, does or does not fall within the sixtieth section of the act of 1 & 2 *Vict.* *c.* 110., which incorporates the provisions of the 3 *G.* 4. *c.* 39. The last-mentioned act contemplates the case of a judgment recovered on a cognovit not filed within twenty-one days, and where no judgment has been signed within the same period. The words of the statute are extremely strong. By the second section, "If, at any time after the expiration of twenty-one days after the execution of such warrant of attorney (or cognovit, sect. 3.), a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall be duly found and declared a bankrupt, that, from and after &c., if at any time after the expiration of twenty-one days next after the execution of such warrant of attorney a commission of bankrupt shall be issued against the persons who shall have given such warrant of attorney (or cognovit) under which he shall be duly found and declared a bankrupt, then and in such case, unless such warrant of attorney or a copy thereof shall have been filed as aforesaid within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed or execution issued on such warrant of attorney within the same period, such warrant of attorney and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under such commission, and such assignees shall be entitled to recover back, and receive, for the use of the creditors of such bankrupt at large, all and every the moneys levied, or effects seized, under and by virtue of such judgment and execution." Clearly

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no distinction can be made between money, and goods remaining unsold in the hands of the sheriff. My brother *Channell* says that the statute must be construed with reference to the then existing state of the law, and that if money levied under an execution, by fraud could not have been recovered then, so neither can it now. He says truly that by the old bankrupt law, as it existed at the time of the passing of the 3 *G.* 4. *c.* 39., an execution upon a judgment signed on a warrant of attorney and on a cognovit which had been completed by seizure and sale two months before the issuing of the commission would not have been defeated by a prior secret act of bankruptcy, the act of 49 *G.* 3. *c.* 121. having given validity to all *bonâ fide* transactions with the bankrupt before that period, provided the party had no notice of any act of bankruptcy, insolvency, or stoppage of payment. It is contended that in this state of the law, a case where no act of bankruptcy had taken place at the time of the execution, could not have been contemplated by the 3 *G.* 4. *c.* 39. I see no such condition; and we are bound to read a statute according to the plain meaning of the language which the legislature has thought proper to use. The words here are, "the judgment and execution thereon shall be fraudulent and void," without any such condition as my brother *Channell* would engraft upon them. If, therefore, a party takes a cognovit without filing it or signing judgment on it within the prescribed number of days, he takes the risk upon himself. It is said that this construction will lead to very great inconvenience. I agree that it may do so. But no one can suffer inconvenience except the party who neglects to pursue the plain directions of an act of parliament. On the other hand, were we to adopt the construction contended for, we should be opening a door to considerable frauds. It is most convenient that securities of this description should not be held back till

erge of insolvency but should be speedily enforced. 1843.
his very case it appears, that the *fi. fa.* issued in
ary, and that in *April* the defendant was in prison. BIFFIN v. YORKE.
out, however, regarding the inconvenience which
e sustained on the one side, or the probability of
ng a door to fraud on the other, I think it safer
low the words of the statute.

SKINE J. I think we ought to look to the words
statute without regard to consequences. The
part of each of these clauses gives to the assig-
power to recover back money levied under an
tion issued upon a warrant of attorney or cognovit,
the instrument has not been filed, and where no
ent has been signed, within twenty-one days. It
to me that we should defeat the intention of the
e, if we were to add to it the qualification which
een suggested.

ASWELL J. (*a*) The words of the statute appear
to be perfectly clear. (The learned judge then
the sixtieth section of 1 & 2 *Vict. c.* 110.) In
ase the cognovit was not filed, nor was judg-
signed, within the prescribed period; and we have
ar and express enactment making every such cog-
and the judgment and execution thereon, fraudu-
and void as against assignees. Before any
ion can arise as to the period at which the execu-
nay issue, we find the execution, generally, de-
l to be fraudulent and void. The execution
therefore be void in every stage. The assignees
uthorised to recover back not only the effects
l (upon which words if they had stood alone, an
ent might have been raised), but "the *moneys*

(*a*) *Maule* J. was absent.

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levied and effects seized, under or by virtue of any such judgment or execution." It is contended by my brother *Channell*, that we must put a *reasonable* construction upon the language of the 3 *G.* 4. *c.* 39. To this I fully agree. But the most reasonable construction which judges can put upon acts of parliament is that which, according to the ordinary rules of reason and common sense, must have been the intention of the legislature in using the language which it has adopted. It is said that it would be a great hardship if a party could be called upon, after several years, to refund that which he has honestly recovered. He can, however, be only called upon to refund money which he has recovered under an execution which is pronounced by the legislature to be fraudulent. Looking to the convenience of the public, we should perceive that a cognovit given whilst the party is apparently in good circumstances that it is best consulted by not allowing it to be kept secret until those circumstances are altered.

The creditors at large have no means of protecting themselves against frauds arising out of several cognovits; but the particular creditor can protect himself by filing his security or signing judgment. It is more reasonable that those should be protected by the law who are not in a condition to protect themselves. No case appears to have occurred in which the point has been determined. In *Wymer* v. *Kemble* (*a*), it was contended that it could not have been the intention of the legislature to interfere with the right of a *bonâ fide* creditor, who had issued an execution and recovered the sum levied before any insolvency on the part of the debtor. But upon that, *Bayley* J. observed, that the party might, by his own diligence, protect himself from the consequences of the 3 *G.* 4. *c.* 39. In that case the difficulty was gotten rid of by holding that

(*a*) 6 *B.* & *C.* 479., 9 *D.* & *R.* 511.

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ient creditor who had levied, was not a person g security for his debt."

Judgment for the defendants.

nell Serjt. submitted, that the plaintiffs were to recover no more than 140*l.* 18*s.* 7*d.* that ıé amount of the levy after deducting the taxes, ge, and other charges.

SWELL J. The defendants must be considered as g the whole, and paying certain sums thereout ıauthorised agent.

verdict was taken by the agreement of the par- 150*l.*

URNE and Another, Trustees, &c. of the MICABLE Loan Society *v.* WHITBREAD.

T. The declaration stated, that before and at : time of the making of the promissory note there- nentioned, and from thence continually until the ıcement of the action, certain persons had formed n loan-society, called the *Amicable* Loan So- ıd established the same, and continued the same ıed for a loan fund for the industrious classes in l, and receiving back payment of the same by in-

A loan-society established pursuant to the provisions of the 5 & 6 *W.* 4. *c.* 23., becomes entitled to the benefit of those provisions, upon

ınd regulations being certified by the barrister appointed for that pur- l before they are inrolled at the quarter sessions.

f the rules of a loan-society directed that the repayment of loans should d by the joint promissory note of the borrower and his sureties, but gave f note which was joint and several. Held, that a joint and several note te made in pursuance of the rules of the society, so as to come within the n from stamp-duty created by the 5 & 6 *W.* 4. *c.* 23: *s.* 7.

interest at the rate of 5*l.* per cent. per annum sh
paid at the time the loan was advanced, and
given for the repayment thereof by a joint pro
note of the borrower, and one or more approv
ties; to be made only to those persons whose cl
and circumstances afforded a reasonable guaran
the money would be usefully employed in a
object, so as to enable the borrower to meet th
ments regularly as they should become due, to l
in the following manner: to wit, on a loan of
instalments of 2*s.*, and 2*d.* each week for rent o
stationery, clerks' salary, and a guarantee fund
the losses from death and contingencies; on a
10*l.*, by instalments of 4*s.* each week, and 3*d.* p
for rent of office, stationery, clerks' salary,
guarantee fund to meet losses from death a
tingencies; and on a loan of 15*l.*, by instalmen
each week, and 4*d.* each week for rent of office,
thereinafter mentioned; that it was by the sa
and regulations further provided, that the rep
of the instalments should be made at the offic
said society, at No. 10. *Upper St. Martin's Lan
Wednesday* evening between the hours of six
o'clock, when the office would be open and att
given for that purpose; that every borrower m
produce his book, in which each repayment w

to the said society for a loan of 15*l.*, to be lent to him according to the said rules and regulations, and that the defendant and one *George Priddle*, at the request of *Linford*, consented to become, and did become, security for him to the said society, and for the repayment of the said loan according to the said rules and regulations; that *Linford* and the defendant had respectively full notice of all the said rules and regulations, and that afterwards, and after the said rules and regulations had been, and whilst they continued, certified, deposited, and enrolled as aforesaid, the said society, according to and in pursuance of the said rules and regulations, and of the several powers and authorities otherwise enabling them in that behalf, on the 22d of *August* 1839, granted and lent to *Linford* a loan of the said sum of 15*l.* upon the security of himself and of the defendant and of *Priddle*, upon and by their making the promissory note thereinafter mentioned; that thereupon afterwards, to wit on, &c., and whilst the said rules and regulations continued so certified, deposited, and inrolled as aforesaid, *Linford* and the defendant and *Priddle* made their promissory note in writing, and thereby, on demand, and jointly and severally, promised to pay to the said Amicable Loan Society, at the office of the said society, at No. 10. *Upper St. Martin's Lane*, a certain sum of money, to wit, 15*l.* sterling, or so much thereof as should be unpaid at the time of any default in the punctual repayments of the instalments, or other violation of the conditions on which it was granted, together with such sums as by the inrolled rules and regulations of the said society were required to be paid on such loan; that *Linford* and the defendant and *Priddle* delivered such note to the said society; that before the commencement of this suit, the whole of the said principal sum so secured by the said promissory note, had become due and payable according to

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the tenor and effect thereof; that before the commen ment of this suit, divers, to wit, fifty weekly instalme of the amount, to wit, 4*d.* for each such instalment, a amounting in the whole to a large sum, to wit, 16*s.* 8 became due and payable according to the tenor a effect of the said promissory note, for and on acco of the said rent of office, &c. pursuant to the said ru and regulations; and that although upon the seve and respective days when each of the said instalme so became due and payable, and at a certain time, wit, between the hours of six and ten o'clock of t evening of such days respectively, the said promiss note was duly presented at the office of the said socie at No. 10. *Upper St. Martin's Lane*, for payment, t said several instalments were not then or at any oth time paid, but on the contrary thereof, at the co mencement of this suit, there was and still was due the plaintiffs, as such trustees, a certain sum, to w 8*l.* 14*s.* in respect of the said several instalments on t said sum of 15*l.*, together with the said sum of 16*s.* 8 for the said several instalments of 4*d.* per week; th *Linford*, and also the defendant, before the commenc ment of this suit, had due notice of all the premise and that by reason of the last-mentioned sums of 8*l.* 1 and 16*s.* 8*d.* being unpaid, an action had accrued to t plaintiffs, suing as such trustees as aforesaid, to demar and have of the defendant the said sums of 8*l.* 14*s.* a 16*s.* 8*d.* above mentioned, making together the sum 9*l.* 10*s.* 8*d.*

Second count, for money lent. Third count, upo or an account stated.

To the first count the defendant pleaded, first, th the plaintiffs were not, nor are trustees of the sai society, *modo et formâ;* secondly, that the rules and re gulations in the first count mentioned, were not inrolled *modo et formâ;* thirdly, that the said promissory not

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was not made, *modo et formâ*. Plea, to the second and third counts, nunquam indebitatus.

At the trial in the sheriffs' court, *London*, in *June* 1842, the rules of the society were produced, which stated, as in the declaration, that loans should be secured by a *joint* promissory note of the borrower, and one or more approved sureties, but gave the form of a *joint and several* note. It was shewn that the rules had been duly certified by Mr. *Pratt*, the barrister appointed under the statute, on the 12th of *August* 1839, and that they had been deposited the next day with the clerk of the peace. They were not, however, inrolled until the 14th of *October* following. The note, which was unstamped, and which purported to be the joint and several note of *Linford*, the defendant and *Priddle* being produced, and the three signatures proved, it was objected that the note was not admissible in evidence, on the ground that it was not framed in pursuance of the rules and regulations of the society, which only authorised the grant of loans upon the *joint* note, and not upon the *joint and several* note, of the borrower and sureties. This objection being overruled, it was further objected, that as the rules and regulations of the society had not been inrolled until *October*, the note taken in *August* was void, inasmuch as the society was not then legally constituted. This objection was also overruled; and a verdict was found for the plaintiffs upon the first three issues with nominal damages (*a*), and for the defendant on the last.

Nov. 3. In the following term, Sir *Thomas Wilde* Serjt. obtained a rule nisi for a new trial on the ground of misdirection.

(*a*) The jury had nothing to find as to the *debt*, the amount not being in issue.

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Talfourd Serjt. (with whom was *Miller*) now shewed cause. The first question is as to the title of the plaintiffs to sue as trustees. The second point made by the defendant is, that the promissory note was not, as the statute requires, in pursuance of and in accordance with the rules and regulations of the society; that the note should have been a joint note, and not joint and several. A third objection was, that the rules and regulations though certified by Mr. *Pratt*, the barrister appointed for the purpose, had not been inrolled. The words of the declaration are, "and all the rules and regulations framed for the management of the said society, have been and are duly certified, deposited and inrolled, pursuant to the directions of the statute in that behalf made and provided." There is a careful avoidance of any statement that this was done before the note was given. [*Erskine* J. Another objection was, that there was no stamp.] That objection was not taken at the trial. If it had been it is difficult to see how the defendant could have got over the seventh section of the 5 & 6 *W.* 4. *c.* 23., which enacts, "that no note &c. which may be entered into for the repayment of any loan made under this act in manner hereinbefore provided, nor any receipt or entry in any book of receipts for money lent or paid, nor any draft or order, nor any appointment of any agent, nor any other instrument or document whatever, required to be given, issued, made, or provided, in pursuance of the rules and regulations of the society, shall be subject to, or chargeable with, any stamp-duty whatever." [*Cresswell* J. Although the defendant may not have put his argument properly before the court, yet the objection is substantially to the want of a stamp. *Maule* J. The allegation that the rules have been and are duly certified, deposited and inrolled, must be intended to mean, that they were certified, deposited and inrolled within the time necessary to make the note

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The allegation might be bad on special de- r, but if traversed, the statement in the plea, that iles, &c. were not inrolled, must be understood in ense which would make the declaration good; ing specially demurred to, the allegation must be in the sense of being *properly* inrolled. Then the ice does prove the issue.] If the defendant had y pleaded that he was never indebted, there might been some difficulty in supporting this objection. *at* C. J. The declaration states that *Linford*, the making of the said promissory note, applied said society for a loan of 15*l.*, to be lent to him ling to the said rules and regulations. Does not ive sense and meaning to the preceding and more al allegation? Reading the whole declaration, it e taken to imply, that the note was not given till the had been certified and inrolled. *Cresswell* J. The could not be inrolled until the next quarter sessions, adjournment of a former sessions.] Upon the being certified by the barrister, and deposited by erk of the peace, the society had done all that was bent on them to do; the inrolment is the act of urt. [*Tindal* C. J. At the end of the fourth section 4 & 5 *W.* 4. *c.* 40., all rules, alterations and amend- thereof, from the time when the same shall be ed by the barrister, shall be binding on the several ers and officers of the said society, and all other ns having interest therein. No discretion is given to the barrister.] The inrolment is merely a of enabling the parties to have the certificate of rrister in the most authentic form. Supposing any t to have occurred in inrolling the proceedings at urt of sessions, the society ought not to be preju- by an omission of which they may be altogether ant. The plaintiffs shew an inrolment before brought. The title of the society refers back to

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the time of the certificate. [*Maule* J. The f is not to be construed with great strictnes literally, it hardly makes sense.] With res objection that the note is joint and several, t note given by the rule explains the rule, and the term *joint* note in the rule must be un applying to a joint and several note.

Channell Serjt., in support of the rule. Th as to the stamp gives rise to two points — the whether the exemption in the 5 & 6 *W.* 4. *c.* 2 plies only to notes or securities made in the scribed by the rules. Here, the rules prescr note. It is true that a form is given of a joint note, but the allegation in the declaration whi issue, refers to the *rules* and not to the *form.* This is clearly a case for an amendment und 4 *W.* 4. *c.* 42. *s.* 23., supposing an amendm necessary.] In the form in which this note i separate action may be supported on it against makers. The plaintiffs are not entitled to sue except upon a security taken in the way provi act. The second point is that, in order to plaintiffs to sue, it was incumbent on the truste that the rules had been inrolled before the comm of the action. The first section of the 5 & 6 enacts "that if any number of persons who ha or shall form any society for the purpose of e a society for a loan fund, and receiving back for the same by instalments with the legal in thereon, shall be desirous of having the bene act, such persons shall cause the rules or r framed, or to be framed, for the manageme institutions, to be certified, deposited, and manner thereinafter directed, and *thereupo* deemed and be entitled to, and shall have, t

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of the provisions contained in that act." Here, the plaintiffs profess to sue as trustees, by virtue of the act. On the other side it is said, that the provisions of the 5 & 6 *W.* 4. *c.* 23. may be explained by those of the 4 & 5 *W.* 4. *c.* 40. But the plaintiffs overlook the third section of the 5 & 6 *W.* 4. *c.* 23. By that section all rules and regulations from time to time made and in force for the management of any such society, and duly inrolled, shall be entered in a book or books to be kept by an officer of such institution to be appointed for that purpose, and which book or books shall be open at all seasonable times for the inspection of persons receiving assistance from such institution, and shall be binding on the several members and officers of such society, and the several persons receiving assistance from the same, and their representatives, as well as those parties who may become the sureties for the repayment of any loan, all of whom shall be deemed and taken to have full notice thereof by such entry and deposit with the clerk of the peace or town-clerk; and the entry of such rules and regulations in such book or books as aforesaid, or the transcript thereof deposited with the clerk of the peace or town-clerk, or a true copy of such transcript examined with the original and proved to be a true copy, shall be received as evidence of such rules and regulations respectively in all cases. The first section makes inrolment a condition precedent to the right of the plaintiffs to sue under the act. The second section introduces a difficulty. That section enacts that all the rules and regulations of any society to be entitled to the benefit of this act, shall be certified, deposited, and inrolled in the same manner as the rules and regulations of any friendly society are required to be certified, deposited and inrolled, pursuant to the provisions of the 4 & 5 *W.* 4. *c.* 40.; and that all the provisions of the said act, as well as those of the 10 *G.* 4. *c.* 56. to con-

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solidate and amend the laws relating to friendly societies so far as the same relate to the framing, certifying, inrolling and altering rules of friendly societies shall be applicable to the framing, certifying, inrolling and altering the rules and regulations of any society to be established under the provisions of this act. [*Tindal* C. J. Does not that section answer the objection raised on the first?] At all events no such construction can be put upon the third section. To adopt the construction contended for on the other side would be, in effect, to repeal the statute. [*Maule* J. The third section does not restrain the operation of the second section, but extends it. The effect of that section is not to narrow the right of the parties, but to enlarge them by making the entries in the book binding. *Erskine* J. You have no plea denying that the defendant had notice of the rules and regulations of the society. *Maule* J. If the argument urged on the part of the defendant is correct even inrolment would not be sufficient.]

Another point is the necessity of inrolment generally. Assuming that the declaration must be understood as containing an allegation that the inrolment took place before the note was given, then the truth of that allegation is put in issue by one or other of the pleas to the first count. The traverse of the allegation that the note was made *modo et formâ*, is a denial that the note was made by the defendant and *Linford* and *Priddle, after the rules had been inrolled.*

TINDAL C. J. It appears to me that in this case there is, in effect, only one point which requires consideration; and that is, at what period this loan-society became entitled to the benefit of the provisions of the 5 & 6 *W.* 4. *c.* 23. In that act the 4 & 5 *W.* 4. *c.* 40. is expressly referred to; and, if this had not been the case, I should still think that those statutes, being *in pari*

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materiâ, ought to be construed together. (*a*) Looking at the provisions of both of these acts, it appears to me that this loan society became entitled to the privileges of the 5 & 6 *W.* 4. *c.* 28. from the time at which its rules and regulations were certified by the barrister. The second section of the 5 & 6 *W.* 4. *c.* 23. directs "that all the rules and regulations of any society to be entitled to the benefit of this act shall be certified, deposited, and inrolled in the same manner as the rules and regulations of any *friendly* society are required to be certified, deposited, and inrolled, pursuant to the provisions of the 4 & 5 *W.* 4. *c.* 40." It goes on to say, "that all the provisions of the said act, as well as (those of) the 10 G. 4. *c.* 56. to consolidate and amend the laws relating to *friendly* societies, as far as the same relate to the framing, certifying, inrolling and altering rules of friendly societies, shall be applicable to the framing, certifying, inrolling and altering the rules and regulations of any society to be established under the provisions of this act." We must therefore look back to the 4 & 5 *W.* 4. *c.* 40., and see what directions are there given as to the mode of certifying the rules, and as to their effect when certified. The fourth section directs that all rules, (and) alterations and amendments thereof, from the time when the same *shall be certified* by the barrister, shall be binding on the members and officers of the society and all other persons having interest therein, that is, amongst others, binding upon persons to whom loans are made. (*b*) The directions are very express. It has been contended that in the 5 & 6 *W.* 4. *c.* 23. the legislature referred to the 4 & 5 *W.* 4. *c.* 40. merely for the purpose of shewing in

(*a*) The title of the act is "An act for the establishment of loan-societies in *England* and *Wales*; and to extend the provision of the friendly societies' acts to the islands of *Guernsey*, *Jersey*, and *Man*.

(*b*) *Vide post*, 454. (*b*).

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what manner the rules were to be certified, and that it was not intended by such reference, to fix the time at which the provisions of the act were to take effect. I think that this would be a strange construction to put upon the act, and one by which parties would be very likely to be misled. It seems to me therefore that the plea, in traversing the time of the inrolment, raises an immaterial issue. The objection as to the stamp is answered by what has been already said.

ERSKINE J. I am of the same opinion. The first objection raised in this case is, that the note, not being stamped, was not receivable in evidence. In answer to that objection the plaintiff relies upon the seventh section of the 5 & 6 *W.* 4. *c.* 23., which exempts from stamp duty notes entered into for the repayment of any loan made under that act. It is material, therefore, to see whether the note in question was given under the act. Referring to the first section we find it provided that persons desirous of having the benefit of the act shall cause the rules and regulations framed for their management to be certified, deposited and inrolled in manner thereinafter directed, and *thereupon* shall be deemed, and be entitled to, and shall have the benefit of, the provisions contained in the act; and it was argued on the part of the defendant that by this clause the certifying, depositing and inrolling were made conditions precedent to the privileges and exemptions conferred by the act. But in the second section we find an express reference to the former statute of 4 & 5 *W.* 4. *c.* 40. the provisions of which, as to the certificate and the inrolment, it adopts. By the fourth section of that statute the rules are not to take effect from the inrolment, but are to have reference back to the time at which the rules are certified.

Then it is said that the jury were misdirected, and that

upon the second issue, they should have been directed to find that the rules were *not* duly inrolled. But the form of the issue taken upon the second plea does not involve the question whether the rules were inrolled *before* the loan was granted or *before* the note was given. The allegation traversed by the plea is, "that all the rules and regulations framed for the management of the said society, have been and are duly certified, deposited and inrolled, pursuant to the directions of the statute." The *terms* of the issue were therefore satisfied by inrolment before action brought. But it is said that this allegation must be understood to *imply* that the rules and regulations were certified and inrolled before the date of the note. If, however, it was not necessary that the rules should be inrolled before the privileges of the statute would attach, no such implication can arise. I therefore think that the allegation, as traversed by the second plea, is made out.

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The defendant relies upon the third section of the 5 & 6 *W.* 4. *c.* 23., as shewing that the fourth section of the 4 & 5 *W.* 4. *c.* 40. was not intended to be incorporated in the subsequent act, except so far as it relates to the manner in which the rules and regulations were to be certified, deposited and inrolled. It appears to me, however, that the effect of the third section of the 5 & 6 *W.* 4. *c.* 23. is, not to alter the effect of the reference to the former statute, but merely to superadd a provision for facilitating proof.

MAULE J. I am of the same opinion. In this case, one question of substance is raised, and two of form. The question of substance is, whether the society can maintain an action upon a note given after the rules are certified by the barrister, but before they are inrolled. The 5 & 6 *W.* 4. *c.* 23. was apparently intended to enlarge the 4 & 5 *W.* 4 *c.* 40., and to extend its provisions to loan

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societies. It is certainly not drawn with n The first section provides, that societies d having the benefit of the act, shall cause the regulations framed for their management, to b deposited and inrolled in manner thereinafte and shall thereupon be deemed, and be entitl shall have, the benefit of the provisions contai act. (a) This was meant to apply to any p should borrow money from the society. The s tion directs, that "all the provisions of the 4 c. 40. and 10 G. 4. c. 56., to consolidate and laws relating to friendly societies, as far as the s to the framing, certifying, inrolling and alte of friendly societies, shall be applicable to th certifying, inrolling and altering the rules lations of any society to be established unde visions of this act." It is only by reason ference to the 4 & 5 W. 4. c. 40. that the nece that the rules and regulations of loan-socie be certified. The provisions of the four of that act must therefore be read as in in the subsequent act; and that section exp vides that all rules, *from the time when the be certified by the barrister*, shall be bindi several members and officers of the societ other persons having interest therein. It i

(a) So, in the 3 & 4 *Vict.* c. 110. s. 3., the words are "that if any number of persons who have formed, or shall form, any society in *England*, for establishing a fund for making loans to the industrious classes, and taking payment of the same by instalments with interest thereon, shall be desirous of having the benefit of this act, such persons shall cause the rules framed for the management of su be certified, depos *rolled*, in manner directed, and *ther* have the benefit visions contained i

This act, howe (sect. 4.) the sam with respect to the certificate of the is found in the c. 40. s. 4. Vide p See also *antè*, 417.

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that this would be the effect of the reference to the former statute, but for the language of the first and third sections of the subsequent statute. The first section of the 5 & 6 *W.* 4. *c.* 23. does nothing more than refer to the second; and the third section is very far from restraining the enactments of the former statute; on the contrary, it enlarges them. It leaves these societies all the powers which they would otherwise have, and, in addition, it empowers them to make entries in a book which shall be admissible in evidence.

Assuming that inrolment is *generally* not necessary, the question arises, whether the terms of the second issue make it requisite to shew an inrolment in this particular case. I think it very clear that they do not. The question is, whether the time at which the inrolment took place, is put in issue by the traverse taken by the second plea. If the time be in issue, it is so only so far as an allegation of time is material. An allegation of time would have been material if the legislature had required that the rules should be inrolled before the provisions of the statute were to attach to the proceedings of a loan-society. I am of opinion, however, that this is not required, and that the allegation of time, therefore, is *not* material.

CRESSWELL J. The two questions raised in the case are substantially the same. I entertained some doubt during the argument, whether the plaintiffs had shewn that this was a case of exemption from stamp-duty, but I now think that the note was admissible in evidence without a stamp. The statute requires the rules to be deposited and inrolled; and it directs that they shall be certified, deposited and inrolled, in the same manner as the rules and regulations of any *friendly* society. The second section incorporates the provisions of the 4 & 5 *W.* 4. *c.* 40., so far as the same relate to the

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framing, certifying, inrolling and altering the rules of preceding societies. Considering the fourth section of the 4 & 5 *W.* 4. *c.* 40., as embodied in the 5 & 6 *W.* 4. *c.* 23., I think it amounts to this, that the rules of a loan-society, *when certified by the barrister*, shall be binding upon the society and other persons interested therein. A person who becomes surety to the society for a loan made by them, is certainly a person interested in the society. (*a*) The note having been given under the rules of the society, is expressly exempted from stamp-duty by the seventh section of the 5 & 6 *W.* 4. *c.* 23. I think, therefore, that nothing is involved in the third issue beyond the question of the signature or non-signature of the note by the borrower and his two sureties.

Rule discharged. (*b*)

(*a*) The language of the act of 3 & 4 *Vict. c.* 110. *s.* 4. is "that all rules and amendments thereof from the time when the same shall be certified by the said barrister, shall be binding on the several members and officers of the said society, and *the borrower and sureties*, and all other persons having interest therein."

(*b*) Loan-societies, which have become very numerous, are now regulated by the 3 & 4 *Vict. c.* 110. (continued by 5 & 6 *Vict. c.* 4. 6 & 7 *Vict. c.* 41. and 7 & 8 *Vict. c.* 54.), with a proviso (sect. 1.) that the provisions of the 5 & 6 *W.* 4. *c.* 23., and all rules theretofore certified by the barrister appointed to certify the rules of savings' banks, and inrolled, for the management of societies established under the said act, shall continue and be in force, and applicable, for the recovery of all sums of money which have been lent by any such society before the passing of this act, and may be due and owing, or become due in respect of any loan made by any such society previously to the passing of the act of 3 & 4 *Vict. c.* 110., according to the rules of such society, except when the same shall be contrary to the provisions contained in the last act.

The right of the plaintiff to sue in the character of *trustee* was assumed, not only in the declaration, but also by the defendant in his first plea.

As to this point, see *Taylor* v. *Williams*, 3 *Queen's Bench Rep.* 413., 2 *Gale & Dav.* 845. *Albon* v. *Pike*, *Antè*, Vol. I. p. 421., 5 *Scott*, *N. R.*

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

URT OF COMMON PLEAS,

IN

Hilary Vacation,

IN THE

IXTH YEAR OF THE REIGN OF VICTORIA.

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e judges who usually sat in banco during this ion were,

TINDAL C. J.	MAULE J.
ERSKINE J.	COLTMAN J.

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Feb. 8.

In case against an insurance broker, for not effecting the defendant the plaintiff's accepted such a reasonable the defend- insurance the same to be and against the insured in such perils, nor did nor any insurance or policy of insurance, sub- and, in

ASE. The first count of the declaration stated that before the committing of the grievances by the de- ant thereinafter next mentioned, the plaintiff was the surance pursuant to his retainer, the declaration stated that tained and employed to cause an insurance to be made on tackle, &c. against the perils of the sea, &c., and that he er and employment; and alleged for breach, that, although had long before elapsed, and before the loss of the ship, id not, nor would, within such reasonable time, cause to be made, insurance the said ship, tackle, &c., and did not, nor would, cause the same to be d, or cause a policy of insurance to be made thereon from and against the of the sea, &c., nor did nor would cause the plaintiff to be insured in t of the said ship, tackle, &c. from and against such perils, nor did nor l cause to be made thereon any insurance or policy of insurance, sub- d or underwritten, but the defendant so to do had wrongfully and, in

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owner and possessed of a certain ship of great value, to wit, of &c., and of certain tackle and other furniture and appurtenances thereof, of great value, to wit, of, &c., and of certain foreign coin and specie of great value, to wit, of, &c., which ship he the plaintiff then proposed and intended should, and the same then was about to, sail and depart on a certain voyage from a certain place, to wit *Newcastle*, to parts beyond the seas, to wit *Rio de Janeiro*, with divers goods of great value shipped and loaded in and on board of the said ship, to be carried and conveyed on freight on board the said ship on the said voyage, whereby freight and gains and profits therefrom of great value, to wit 500*l.*, might and could and would have accrued to the plaintiff; that thereupon theretofore, to wit on the 23rd of *August*, 1841, the plaintiff, at the special instance and request of the defendant, retained and employed the defendant to cause to be made, according to the custom of merchants, insurance upon the said ship, tackle, furniture, and appurtenances, and the said coin and the said freight, and to cause the same to be insured, and to

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breach of his duty and retainer, wholly neglected and refused; whereby, the vessel being lost, the plaintiff was without the benefit of insurance.

Upon an issue upon a plea of not guilty, it was shewn that the defendant had contracted with an insurance company for an insurance on the plaintiff's ship, tackle, &c., and shortly afterwards obtained from the secretary of the company what purported to be a copy of the policy. A stamped policy was afterwards subscribed, but was not given out, the practice of the company being to retain in possession of policies until they were wanted in consequence of a loss. There was no evidence to show the precise time when the stamped policy was actually executed; but it was proved that it was usual to execute policies very shortly after the receipt of orders. A demand of the policy was made on the part of the plaintiff after the loss of the vessel, to which the defendant gave an evasive answer. The judge left it to the jury to say whether or not the defendant had procured the policy to be executed within a reasonable time. The jury having found for the plaintiff, and the judge being satisfied with the verdict, the court refused to grant a new trial.

Held also, on motion in arrest of judgment, that the action was founded on an express contract, and that the declaration was sufficient, the terms of the breach not being larger than the terms of the contract.

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se a policy or policies of insurance to be made, sub-
bed, and underwritten thereon, in and as to the said
age so intended as aforesaid, from and against perils
ne seas and other risks usually borne and taken upon
nselves, in marine policies of insurance, by under-
ers and insurers, and upon the usual terms and con-
ns of marine insurance, and to cause the plaintiff to
nsured in respect of the said ship, tackle, furniture,
appurtenances, coins, and freight, in and as to the
intended voyage, from and against such perils and
r risks so usually borne and undertaken as aforesaid,
it, in certain amounts respectively; (that is to say,)
the said ship or vessel in 1000*l.*, the said tackle,
iture, and appurtenances in 250*l.*, the said coins in
l., and the said freight in 100*l.*, for reasonable hire
reward to the defendant in that behalf; and the
ndant then accepted, and entered upon, such retainer
employment: that the plaintiff then and from thence
tinually afterwards, until and at the time of the loss
ein mentioned, was possessed of, and interested in,
said ship, tackle, furniture, and appurtenances, and
s and freight respectively as aforesaid, to large
unts and values respectively, to wit, to the said
ral amounts and values of 1000*l.*, 250*l.*, 500*l.*, and
l. respectively, wherein the same were so to be
ectively insured as aforesaid; and although a reason-
time in that behalf had long before the commence-
t of the suit elapsed, and before the loss of the said
, tackle, furniture, and appurtenances, and coins and
ght thereinafter mentioned, to wit, on the 29th of
gust, 1841, whereof the defendant then had notice;
the defendant, not regarding his duty in that behalf,
contriving and intending to injure the plaintiff, did
, nor would, within such reasonable time as aforesaid,
se to be made, according to the custom of merchants,
urance upon the said ship, tackle, furniture, and ap-

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purtenances, and the said coins and the said freight, or any or either of them, and did not nor would cause the same, or any part thereof, to be insured, or cause a policy or policies of insurance to be made, subscribed, and underwritten thereon, or on any part thereof, in and as to the said voyage so intended as aforesaid from and against perils of the seas and other risks usually borne and taken upon themselves in marine policies of insurance by underwriters and insurers, and upon the usual terms and conditions of marine insurance, nor did nor would cause the plaintiff to be insured in respect of the said ship, tackle, furniture, and appurtenances, coins and freight, or any part thereof, in and as to the said intended voyage, from and against such perils and other risks so usually borne and undertaken as aforesaid, in such amounts as aforesaid, and did not, nor would, cause to be made thereon any insurance or policy of insurance subscribed or underwritten, although the plaintiff then was ready and willing to pay to the defendant such hire and reward as aforesaid; but the defendant so to do then and thitherto wrongfully and in breach of his duty and retainer and acceptance thereof, wholly neglected and refused, and still did neglect and refuse: that he, the plaintiff, confiding in the said retainer and employment so given to, and accepted by, the defendant as aforesaid, theretofore, to wit, on the 26th of *August*, 1841, suffered and permitted the said ship to, and the same did, to wit, on the day and year last aforesaid, with the said tackle, furniture, and appurtenances, and with the said coin on board, set sail from *Newcastle* aforesaid on her said voyage towards *Rio de Janeiro* aforesaid, with the said goods so shipped and loaded on board thereof as aforesaid, to be carried and conveyed on freight as aforesaid; and afterwards, and after the breach of duty by the defendant aforesaid, and whilst the said ship was proceeding on her said voyage, and

re her arrival at *Rio de Janeiro* aforesaid, to wit, on
1st of *August*, 1841, the said ship, with the said
le, furniture, and appurtenances, and coins, on
d as aforesaid, and with the said goods so shipped
loaded on board as aforesaid, to be carried and
eyed on freight as aforesaid, by the perils and
ers of the seas on the high seas was rent and
en to pieces and sunk, and the same were then on
high seas, by the perils and dangers of the seas,
lly lost to the plaintiff, and never did arrive at *Rio*
neiro aforesaid; and the plaintiff thereby then also
and was deprived of, the said freight of the said
ls loaded in and on board the said ship or vessel to
mount, to wit, of the sum of 100*l.* so to have been
red in respect thereof as aforesaid, the said loss
g by and through one of the perils, to cause to be
e insurance, and cause a policy or policies of in-
nce to be made, subscribed, and underwritten, against
h, the plaintiff had retained and employed the de-
ant as aforesaid, and in respect whereof the plaintiff
d and might have recovered from and against the
rers and underwriters the full amount of the said
ral amounts and sums respectively, if the defendant
regarded his duty in that behalf, and had caused
insurance to be made, and had caused such policy
olicies of insurance to be made, subscribed, and
erwritten, as he had as aforesaid been retained and
loyed to do; whereby, and by reason of the neglect,
roper conduct, and breach of duty by the defend-
the plaintiff had wholly lost and been deprived of
h insurance, and policy, or policies of insurance, and
moneys and indemnity he might and would have
cured and recovered thereby.

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There was a second count, in trover, for "certain
truments in writing called policies of insurance, to wit,
r policies of insurance; one of the said policies pur-
ting to be in and for the sum of 1000*l.* on a certain

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ship called the *Thérèse*, one other thereof in and for the sum of 250*l.* on the tackle and other furniture and appurtenances of the said last-mentioned ship or vessel, one other thereof in and for the sum of 500*l.* on certain foreign coins and specie to be shipped and carried on board the said last-mentioned ship or vessel, and one other thereof in and for the sum of 100*l.* on freight to be made and earned by the said last-mentioned ship or vessel."

The defendant pleaded, first, not guilty; secondly, to the first count, that the plaintiff did not retain or employ the defendant to cause to be made, according to the custom of merchants, insurance upon the said ship, &c., or to cause the same to be insured, or to cause a policy or policies of insurance to be made, subscribed, and underwritten thereon, or to cause the plaintiff to be insured in respect of the said ship, &c., *modo et forma*; thirdly, to the second count, that the plaintiff was not lawfully possessed of the said policies of insurance in the said second count mentioned, or of any or either of them, as of his own property.

The replication joined issue on these pleas.

At the trial of the cause before *Maule* J. at the last assizes for *Newcastle-upon-Tyne*, it appeared that, in *August* 1841, the defendant, who is an insurance broker in that town, was employed by the plaintiff to effect insurances as well upon the ship *Thérèse*, of which the plaintiff was owner and master, as also upon the furniture and freight. Accordingly, on the 23rd of that month, the defendant effected the following insurances with the *Newcastle* Commercial Insurance Company: on the ship, &c., 500*l.*; on the specie, 200*l.*; on the furniture, 250*l.*; and with the *Newcastle* Marine Insurance Company, on the ship, 500*l.*; on the specie, 500*l.*; and on the freight, 100*l.* The vessel sailed for *Rio de Janeiro* on the 26th of *August*, and on the 31st she foundered at sea. The defendant had notice of the loss

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On the 8th of *December* 1841, the solicitor of the plaintiff wrote him the following letter: —

"*December* 7th, 1841.

"*Thérèse* of *Hamburgh*; *John Turpin*, Master.

"Mr. *Turpin* not being able to obtain from the Marine and Commercial Insurance Companies in your town, payment of the amount of insurance effected by them in *August* last, has placed the matter in my hands for the purpose of enforcing the payment by legal proceedings. I will therefore thank you to give me all the information you can, relative to the mode by which the insurance was effected, and also the names of the gentlemen who underwrote the policies; for I presume the companies are not incorporated, and that the members underwrite as at *Lloyd's*. You will also be pleased to send me such of the policies as are in your possession, and to inform me in whose possession the others are, and why they are not given up."

The defendant's reply was as follows: —

"*Newcastle-upon-Tyne*, 13th *December* 1841.

"We duly received your letter of the 7th instant, and in reply beg to say, that if Captain *Turpin* will pay us 41*l.* 15*s.* 3*d.*, the amount due to us from him, into the hands of Messrs. *Barclay*, *Bevan*, & Co., bankers, we shall be glad to forward to his order copies of the policies referred to in your letter, signed by the secretaries of the respective companies with whom the insurances were effected."

On the 20th of *December* 1841, the plaintiff's solicitors wrote again in these terms: —

"Mr. *John Turpin*, late master of the ship *Thérèse*, has placed in our hands your letter to his late solicitor, Mr. *P.*, wherein you state that if Captain *Turpin* will pay 41*l.* 15*s.* 3*d.*, the amount due to you, into the hands of Messrs. *Barclay* & Co., bankers of this place,

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you will forward to his order *copies* of the policies referred to in Mr. *P.*'s letter. We understand that you omitted to obtain from the insurance companies the original policies when they were effected, and that the companies now refuse to deliver them out, by which Captain *Turpin* is prevented from adopting measures to recover the amount of such policies. We shall be glad to be informed by return of post whether you have the original policies, and, if not, whether you can obtain them, and we will consult Captain *Turpin* as to the payment of your demand."

Again, on the 28th, the plaintiff's solicitors wrote—"We wish particularly to ascertain whether these copies (referring to the copies mentioned in the defendant's letter of the 13th) are what the companies delivered to you as the policies, or whether the companies have the policies now in their possession."

Some further correspondence took place between the parties, but without leading to any result.

It was not distinctly shewn when the policies were actually executed; but the secretary and one of the directors of the *Newcastle* Commercial Insurance Company, who were called as witnesses, stated that the practice of the office was to execute a policy on stamped paper very shortly after the receipt of the order; and that the defendant had applied to the company for the policies before the commencement of the action, but that they had refused to give them out to him on the ground that the loss was suspected to have been fraudulent. A formal demand of the policies was made on the 15th of *April* 1842; but they were not delivered up. (*a*)

For the defendant it was submitted that the correspondence amounted to an admission on the part of the plaintiff, that the policies had been effected shortly after

(*a*) The policies were given up after action brought.

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order was given, and that the evidence with respect he usage of the company shewed that there had been breach of duty by the defendant.

For the plaintiff it was contended that it was to be inred from the correspondence that the policies had er been effected.

The learned judge left it to the jury to say whether not the defendant had procured the policies to be uted within a reasonable time.

The jury having found a verdict for the plaintiff on first count, damages 80*l.*, and for the defendant on second count,

Sir *Thomas Wilde* Serjt., in *Michaelmas* term last, ed for a rule nisi, for a new trial on the ground that verdict was against the evidence, or to arrest the gment. On the latter point he submitted that the on, though in form an action of tort, was substanly an action of contract, and consequently the conct ought to be correctly alleged; that the retainer red, absolutely to insure the ship, was larger than warranted by law; that it was no where alleged t the defendants could have effected the insurance. e averment was that he had engaged to insure her on the usual terms, which means on the usual prem; consequently it ought distinctly to have appeared t the vessel was one that might have been so insured. ain, the declaration contained no allegation that the intiff was ready and willing to pay the premiums. e learned serjeant also contended that case was not intainable, where, as here, the supposed cause of tion arose wholly out of a breach of contract unacmpanied by any wrongful act; but he abandoned this int when the rule came on for argument.

A rule nisi having been granted,

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Channell Serjt. (with whom were *Hoggins* and *Bramwell*) shewed cause. With respect to the first point, there was abundant evidence to warrant the jury in concluding that the defendant never effected the policies of insurance. Assuming that the defendant gave orders to the offices for the insurances, and that the policies were executed by the directors, and that copies were given to the defendant, it still cannot be said that the defendant had done what he was bound to do. It cannot be contended that he caused the insurance to be made according to the contract alleged, until he obtained from the offices the policies themselves, so that he might either deliver them to the plaintiff or hold them as his agent. Until he had placed the plaintiff in a situation to enforce the policies, every thing he had done might be considered nugatory; for the words "effecting an insurance" can only mean that the insurance is to be completed. It appears, however, that he never applied for the policies until after the loss of the ship. There was no evidence that the policies ever had been actually issued before that time. There was no identification of the copies given out with any particular policies; and, in truth, the papers given out were mere copies of the *contract* to insure. [*Tindal* C. J. Supposing the plaintiff had brought an action against either of the companies, and had given notice to produce the original, would not the copy, in case the original had not been produced, have been sufficient evidence of the policy?] That might be so if the company had delivered the copy *as* a copy of a policy executed by them; but no proof was given at the trial that any policy had then been signed; and, unless it could be clearly shewn that the original was then in existence, the copy would not be admitted in evidence. [*Maule* J. The proof was rather the other way as to the policies being then executed; for, according to the practice, a copy is first made in the company's

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ok, and the copy for the party is made from that, and policy is made out afterwards.] According to that s clear that the copies given to the defendant were made from the policies themselves, but were merely ies of so many executory contracts to insure; and it is aterial whether the policies were completed on the t day or a year afterwards. In case the policies were ed shortly after the order, it was a clear breach of y in the defendant not to get them from the office in a sonable time, so as to give the plaintiff, in case of a s, the means of suing thereon. Supposing, on the er hand, that a considerable period elapsed before policies were executed, there was a still stronger ach of duty in not obtaining them so as to give the intiff a complete, instead of an imperfect, security. It ght have been different if the companies had given ice of the policies having been made out, in such a y as to identify them; but as the case stands there s no appropriation of any particular policies to the intiff. It is submitted, therefore, that there is no tence for saying that the verdict was against the dence.

The other point is, whether, assuming the declaration have been proved to the extent disputed by the plea, it good in point of law. One objection is, that the duty of e defendant is laid too largely. Though this in form is n action on the case, it is founded on an express contract; nd no duty, stated as it results from the contract, can be aid to be laid too largely. The declaration does not allege that the plaintiff employed the defendant as an insurance-broker,—leaving it for the law to ascertain what his duty was,—but it expressly avers that the plaintiff retained the defendant to cause to be made insurance upon the ship, nd to cause the plaintiff to be insured in respect thereof, nd that "the defendant then accepted, and entered upon, ich retainer and employment;" and the breach of duty

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is laid precisely in the same language as the re
and employment. Suppose the declaration had
that the plaintiff had retained the defendant to
tain acts, and that the defendant undertook "to
duty in the premises," it could not be said that
was laid too largely. With respect to another
the undertaking of the defendant is, to effect an
for hire, and not to effect an insurance the pl
viding the premium; and there is an allegati
plaintiff was ready and willing to pay the d
hire and reward. If the payment of the
necessary in order to effect the insurance, th
whether the defendant, by undertaking to
not engage to pay the premium and stipu
certain remuneration, such remuneration
the premium and his own charges.
does not enter into a qualified under
funds are furnished to him; but his obli
the insurance at all events. As to the
it is not alleged that he could effect t
averred that, although a reasonable ti
the purpose, he had not caused th
made. After verdict that is a suffic
it was in the defendant's power to
for his undertaking is absolute, o
all, by the allowance of a reasona
pose; which, it is averred, he ha

Sir T. Wilde Serjt. (with wh
W. H. Watson), in support of th
evidence is looked at, it is cle
effected shortly after the orde
by the defendants. The deli
tinct intimation that the pol
out. The defendant is no
of the companies in with

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nd that they believed the loss of the vessel to have fraudulent. The defendant discharged his duty, ding to the usual course of business at *Newcastle*, ving orders for the insurances, and by procuring s of the policies, and handing them over to the tiff. There is no reason to think that, in this ice, the companies did not cause the policies to be out within a day or two, according to their or- y practice. It is said that it is not sufficient to the policies, but that they must be actually ob- d from the companies. The procuring of the policies selves must be regulated by the course of business e town. The breach is however alleged not in not ning the policies from the offices, but in not effect- hem. If the defendant had been charged with not ring the policies from the companies after they been effected, the defence would have been of a y different kind. So, the question for the jury was, her the defendant had neglected, not to obtain the ies, but to effect them; and the other side are seek- o support the verdict on one ground by evidence of tinct breach of duty. There can be no doubt that policies were effected shortly after the order was n; and the verdict is clearly against the evidence.

With respect to the declaration, the allegations it ains are applicable only to the employment of the ndant as an insurance-broker to perform his or- ry duty, that is, to use ordinary diligence in the harge of his duties. His undertaking is not stated contract. He is to insure "upon the usual terms;" it was necessary, in order to make him liable, to ge, that he could have insured the vessel "upon the l terms." For, by his retainer, he is precluded from g more than the customary premium; and if he d not insure upon paying such premium, he was warranted in insuring at all. Although it is averred

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that the plaintiff was ready and willing to pay the defendant his hire, it is not stated that the defendant had notice thereof.

TINDAL C. J. now delivered the judgment of the court.

In this case a rule nisi was obtained for setting aside the verdict which had been obtained by the plaintiff, and granting a new trial, or, in case that was refused, for arresting the judgment. It was an action by a ship-owner against an insurance-broker. In the first count of the declaration (on which alone the question arises) the plaintiff,—after setting out that he had retained and employed the defendant to cause an insurance to be made on his ship, tackle, &c., and that the defendant had accepted, and entered upon, such retainer and employment,—alleged, by way of breach, that although a reasonable time had elapsed long before the commencement of the suit and before the loss of the ship, yet the defendant did not, nor would, within such reasonable time, cause to be made, according to the custom of merchants, insurance upon the said ship, tackle, &c. and did not, nor would, cause the same to be insured or cause a policy of insurance to be made, subscribed and underwritten thereon, from and against the perils of the sea, and other risks usually borne by underwriters, nor did, nor would, cause the plaintiff to be insured in respect of the said ship, tackle, &c. from and against such perils, nor did, nor would, cause to be made thereon any insurance or policy of insurance subscribed or underwritten; but the defendant, so to do, had wrongfully and in breach of his duty and retainer and acceptance thereof, wholly neglected and refused, and still did neglect and refuse. The second count was in trover for the policies of insurance. To the first count the defendant pleaded the general issue, and also a plea traversing

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the retainer; but the first plea alone is now material. On the general issue the question arose whether the breach of duty, as alleged in the first count, was proved. It appeared in evidence that the defendant, an insurance-broker employed by the plaintiff, had contracted with the *Newcastle* Commercial Insurance Company, for an insurance on the plaintiff's ship, tackle, &c. immediately after he had been employed to do so; and that shortly afterwards papers were given out by the company to the defendant, as being copies(*a*) of the policies. Stamped policies, in the same terms with the copies given out, were afterwards subscribed, although the exact time when the policies were subscribed did not distinctly appear; and the question agitated at the trial, and submitted to the jury, was, whether the defendant had procured the policies to be executed within a reasonable time. There was no precise evidence as to the time at which the policies were actually executed and completed. The defendant contended that the correspondence, which was put in evidence on the part of the plaintiff, amounted to an admission, on his part, that the policies had been effected shortly after they were ordered; and, further, that the evidence given by the secretary and the director, proved the usage to be, that the company executed them on stamped paper very shortly after the order, and kept them in a locked-up drawer, not to be delivered to the assured until wanted in consequence of a loss. The plaintiff, on the contrary, relied on a distinct request made by him to the defendant, that he would produce the policies; from which the defendant excused himself upon a ground which the plaintiff contended was an evasion only, and furnished the necessary inference that they were not in existence. These two conflicting views were placed before the jury, who, it would appear, drew their con-

(*a*) These papers would appear to have been copies of *drafts* of policies. *Vide supra*, p. 464, 465.

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clusion in favour of the plaintiff; and my brother *Maule* who tried the cause, appears satisfied with their finding.

A second prayer of the motion was, that the judgment should be arrested. And the objection taken in arrest of judgment is, that the duty cast upon the defendant by the contract into which he entered, was not an absolute duty, as alleged in the declaration, to effect an insurance at all events, as in the nature of a warranty, but that it was a *mandatum* only, and that the defendant was bound only to use a proper degree of care and diligence to perform what he had undertaken. But to this we think the proper answer has been given at the bar,—viz. that the action is founded on an express contract; and that the breach is not larger than the terms of the contract, but is framed in the same precise terms; and that the allegation in the declaration, that the defendant to perform his promise "wrongfully, and in breach of his duty and retainer and acceptance thereof, wrongfully neglected and refused," is a legal charge, sufficient to call for an answer, leaving it to the defendant, if he sought to excuse himself on the ground of impossibility of finding persons ready or willing to underwrite the particular risk, or on any other justifiable ground either to shew it in evidence at the trial as an answer to the breach, or to plead it by way of excuse, as he should be advised. (*a*)

We therefore think that there is no ground for arresting the judgment, but that our judgment should be given for the plaintiff.

Rule discharged.

(*a*) The stipulation of "hire and reward," *antè*, 458. 466., would also appear to be an answer to the objection taken. An agreement for reward or benefit would not constitute the agent a *mandatary*, but would impose on him the more extensive liability of a *locator operis faciendi*.

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Feb. 8.

ASSUMPSIT, for money lent, interest, and money due upon an account stated.

The defendant pleaded—to the whole declaration,—secondly, as to the sum of 500*l.*, parcel &c., that on the 10th of *October* 1839, from thence until the 6th of *June* 1840, the plaintiff, the defendant and other persons did illegally associate together in a certain illegal undertaking, project, and attempt, tending to the common grievance, prejudice, and inconvenience of the subjects of our Lady the Queen, in general, and great numbers of them, in their trade and commerce; that is to say, that the plaintiff, the defendant and the said other persons did, during the time aforesaid, act as a corporate body, and pretend to be a trading corporation, by and under the name and style of "The *Limerick* Marble and Stone Company," and did then also pretend to raise and transfer stock in the said company, and that the said stock consisted of 50,000*l.*, divided into five hundred shares of 100*l.*, and did then also pretend to transfer and assign shares in such stock without legal authority, either by act of parliament, or by charter from the crown, or by letters patent under the great seal, or by any other lawful body, and pretend to be *a trading corporation*, under the name &c., and did pretend to raise and transfer stock in the said company, and that the said stock consisted of &c., and did pretend to transfer and assign shares in such stock, without legal authority by act of parliament, charter, or letters patent &c., and that the money was lent for the purpose of furthering such illegal undertaking, was bad, as not describing such an illegal association as would constitute a nuisance at common law.

Held, also, that a plea to such a count, stating that the money was lent for the purpose of carrying on a trading copartnership, and that the plaintiff afterwards became a member thereof, and that complicated accounts arose between the plaintiff and the defendant in respect of such copartnership, which included the sum lent, was no answer to the action.

Raising and transferring stock is not a nuisance at common law.

Held, therefore, that a plea to a count in assumpsit for money lent, stating that the plaintiff and defendant, and other persons, did illegally associate in a certain illegal undertaking, tending to the common nuisance of the subjects; that is to say, that the plaintiff, defendant, and the other persons, did act as a corporate

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authority whatsoever, to warrant such acting as a corporate body, or the raising of transferable stock, or the transferring of shares therein; whereof the plaintiff then had notice: that the plaintiff, well knowing the premises, for the furthering, countenancing, and promoting of such illegal undertaking and project, to wit, on the 10th of *October* 1839 aforesaid, lent and advanced to the defendant a certain sum of money, to wit, 500*l.*, and he the defendant then received the same, for the purpose aforesaid, and then with the knowledge, privity and assent of the plaintiff, paid, laid out, and expended the same upon and for the furthering, aiding, and promoting of the said illegal undertaking and project: and that the last mentioned sum of 500*l.* so lent and advanced as aforesaid was the same cause of action in the introductory part of this plea mentioned, and whereof the plaintiff had above in his said first count complained against the defendant.—Verification.

Thirdly, that the said sum of 500*l.*, parcel &c., was lent by the plaintiff to the defendant for the purpose of carrying on a certain trading copartnership before then entered into between the defendant and certain other persons, under the name and style of "The *Limerick* Marble and Stone Company," and the same was then expended by the defendant in and about the said copartnership, and the carrying on thereof: that, after the last-mentioned sum had been so lent and expended as aforesaid, to wit, on &c. the plaintiff became and was a member of the said copartnership, and so remained and continued from thence until &c.: that the plaintiff on divers days and times, whilst he was such member of the said copartnership as aforesaid, and before the commencement of this suit, received divers sums of money, in the whole amounting to a large sum of money, to wit, 1000*l.*, on the account and for the use of the said copartnership, and that divers compli-

cated accounts then arose between the plaintiff and defendant in respect of and relating to the said co-partnership, which accounts included, amongst others, the said sum of 500*l.*, parcel &c. in the introductory part of this plea mentioned: and that no settlement or adjustment of the said partnership accounts had been at the time of the commencement of this suit nor hath yet been made, but that the same were at the commencement of the suit and still were open, depending, and unliquidated.—Verification.

The fourth and fifth pleas, pleaded to the second count only, were, respectively, similar to the second and third pleas pleaded to the interdiction.

Replication to the second plea; that the plaintiff, the defendant, and the other persons did not associate together in the undertaking, project, and attempt in the said plea mentioned, and did not act or pretend in manner and form as therein mentioned; and that the sum of 500*l.*, in the said second plea mentioned, was not lent and advanced to the defendant, nor was the same received by the defendant for the purpose in the said plea mentioned; nor was the same with the knowledge, privity, and assent of the plaintiff paid, laid out, and expended, in manner and form as the defendant hath in the said plea in that behalf alleged; conclusion to the country. (There was a similar replication to the fourth plea.)

To the third and fifth pleas, the plaintiff replied *de injuriâ*.

Special demurrer to the replication to the second plea, assigning for causes, that the said replication was multifarious and double, and that the plaintiff had thereby attempted to put in issue several distinct matters, namely, whether the plaintiff, the defendant, and other persons associated together in the undertaking,

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project, and attempt in the plea mentioned, and also whether they acted or pretended in manner and form as therein mentioned; and also whether the said sum of 500*l.* in the said plea mentioned was lent and advanced to the defendant, and received by him for the purpose in the said plea mentioned; and also whether the said sum was, with the knowledge, privity, and assent of the plaintiff, paid, laid out, and expended, in manner and form as the defendant had in the said plea alleged: that the replication was an informal mode of pleading the general replication *de injuriâ*, which last-mentioned replication could not, by the rules of law, be pleaded to the said second plea: that the plaintiff had in and by his said replication attempted to raise certain immaterial, superfluous, and complex issues, that is to say, he had traversed the allegation that the plaintiff and defendant acted and pretended as in the said plea mentioned, which fact was involved in, and arose out of, the question — whether or not the plaintiff and defendant associated together in such undertaking &c., as is in the said plea mentioned: that the plaintiff had traversed, and attempted to put in issue, the purpose for which the said sum of 500*l.* was lent by the plaintiff to the defendant; whereas if the said sum was, with the knowledge &c. of the plaintiff, paid &c. by the defendant in the said illegal undertaking &c., the fact of the said sum not having been lent and advanced to the defendant, or received by him, for the purpose in the said second plea mentioned, was wholly immaterial: that the traverse taken by the replication was too large, in this, to wit, that it attempted to put in issue the fact — whether or not other persons were associated with the plaintiff and defendant in the said undertaking &c., which fact was wholly immaterial to the defence set up: that the replication was uncertain, inasmuch as the defendant could not thereby know whether the

neant to deny that he associated with the , or that he associated with other persons, or ıssociated with the defendant and other per- ıe said undertaking &c.

was a demurrer to the replication to the fourth ɔn which the defendant assigned the same demurrer as upon the demurrer to the repli- the second plea.)

demurrer to the replication to the third plea, for causes, that the third plea did not matter of excuse, so as to entitle the plaintiff such general form of replication: that the de- y his said plea claimed a *title and interest* in sum of 500*l.* therein mentioned, and set up a etain the same: that in the same plea *authority* ɔed to have been derived from the plaintiff: the plea was double and multifarious. (There ilar demurrer to the replication to the fifth plea.) r in demurrer. (*a*)

ıse was argued in *Hilary* term last.

rd Serjt. (with whom was *Hurlstone*), in sup- the demurrers. (*b*) The replications to the

e following points ɛed for argument on ' the plaintiff: — the several replica- ıurred to are good, none of the grounds er specially assigned

l also be argued that of the defendant by lly, thirdly, fourthly, above pleaded, are that the second and s are bad for this, ther reasons, namely, ɛ is nothing illegal, common or statute law, in the said company called 'The *Limerick* Marble and Stone Company,' acting in the manner stated in the said second and third pleas; and that the third and last pleas are bad, inasmuch as the matters therein contained, namely, the existence of complicated partnership accounts between the plaintiff and defendant, is no answer to the demand of debts which became due previously to the existence of the partnership."

(*b*) When the case was called on, the learned serjeant

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second and fourth pleas put in issue at least two things which are immaterial, — first, the fact that the plaintiff and defendant did associate with other persons; and, secondly, not only the purpose for which the money was lent, but also that for which it was applied. [*Cresswell* J. Is it open to the defendant to say that these allegations are immaterial, when he himself has put them on the record?] A plea is not made bad by the introduction of immaterial circumstances; nor can the plaintiff make such matter material by traversing it; *Regil* v. *Green* (*a*), *Moore* v. *Boulcott* (*b*). [*Cresswell* J. In the last-cited case the defendant pleaded to an action on an attorney's bill, that the bill was for work at law and in equity, and was not delivered a month before action brought. The replication, that the bill was not for work at law and in equity, was held bad, not because it contained two answers to the plea, but because it contained none.] That case shews it is not enough merely to traverse an allegation in the very terms of the plea.

As to the replications to the third and fifth pleas, it is now settled that *de injuriâ* is admissible in assumpsit; *Isaac* v. *Farrar* (*c*), *Griffin* v. *Yates* (*d*), *Purchell* v.

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confined his argument to attacking the replications; and upon his attention being called by the court to the above objections to the pleas, which had been delivered on the part of the plaintiff to the judges, he stated that he was not aware of them, and that he had been taken by surprise. *Cresswell* J. observed that was the fault of his client, whose duty it was to have made inquiry at chambers. *Tindal* C. J., however, added that perhaps the defendant could not have gained any information by inquiry at chambers, as the points were only inserted in the paper-books, which were delivered to the judges. *Channell* Serjt., for the plaintiff, referred to *Scarfe* v. *Chappelow*, *antè*, Vol. IV. p. 336.; 2 *Dowl. N. S.* 83.

As the court ultimately decided the case upon the validity of the pleas, the argument as to the replications is very briefly reported.

(*a*) 1 *M. & W.* 328.

(*b*) 1 *New Ca.* 323., 1 *Scott*, 122.

(*c*) 1 *M. & W.* 65.; *Tyrwh. & G.* 281.; 4 *Dowl. P. C.* 750.

(*d*) 2 *New Ca.* 579., 2 *Scott*, 845

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ter (*a*), but subject to the rule in *Crogate's* case (*b*), t such general form is only allowable where the plea s up matter of excuse, and not of discharge. An use must arise before, or at the time, the contract is ken, but a discharge must be afterwards.

he third plea in this case does not consist of matter excuse; it admits the cause of action, namely, the ; and it does not insist on the illegality of the tract. [*Tindal* C. J. The question is, whether that contains any answer to the action. It admits the , and then states a subsequent partnership with the ntiff, and that the money previously lent by the ntiff was mixed up with the partnership accounts. at does not appear to be any answer to an action to over the loan. *Erskine* J. At present, I believe, we think that the plea is bad.] Perhaps it may amount to pecial set-off. [*Cresswell* J. In what manner? The endant does not say which way the balance of the ount would be. *Tindal* C. J. A set-off can only be intained on an ascertained debt. But here the de- dant expressly says that the debt is not ascertained.] he learned serjeant then admitted he could not port the third and fifth pleas.

Channell Serjt. for the plaintiff. Assuming that the ond and fourth pleas are good, the replications to m are sufficient, as they put in issue all the facts ich those pleas set up as constituting one defence. an alleged immaterial fact is so mixed up in a plea th others which are material that together they form rt of the whole defence, the plaintiff has a right to verse the plea in its terms. (Upon this branch of the gument he cited *Clugas* v. *Penaluna* (*c*), *Biggs* v.

(*a*) 1 *Q. B.* 197. 209.; 1 *& D.* 682. 693.

(*b*) 8 *Co. Rep.* 66.

(*c*) 4 *T. R.* 466.

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Lawrence (*a*), *Waymell* v. *Reed* (*b*), *Benison* v. *Thelwell* (*c*), *Webb* v. *Weatherby* (*d*), *Bell* v. *Tuckett* (*e*), and *Dewergier* v. *Fellows*. (*g*)) [*Tindal* C. J. The pleas in question comprise three separate allegations: first, that the plaintiff had entered into an illegal company; secondly, that the money lent was part of the stock of such company; and thirdly, that the money was applied to illegal purposes with the privity of the plaintiff. Of these three allegations two at least contain each a distinct answer to the action. If the illegal company was not formed, the plea falls to the ground. If the money was not lent for an illegal purpose, the same result would follow. These are separate and distinct allegations which the plaintiff has included in his replication; and as at present advised, I should say it would be better to see whether the pleas are good.]

The pleas cannot be supported. The facts which they set out as constituting the illegality of the association are, in terms, the same as those mentioned in the bubble act (6 *G.* 1. *c.* 18. *s.* 18.) But that act was repealed by the 6 *G.* 4. *c.* 91. The demurrer admits, not the illegality of the company, but merely the facts from which the court will decide whether or not it was illegal. But the facts stated do not shew any such illegality. They merely disclose a method of forming and dissolving a joint stock partnership by transferring stock. It is not stated that the company acted as a corporation in any illegal way, or that they affected to use a corporate seal. There is nothing to shew the company was illegal at common law; *R.* v. *Webb* (*h*)

(*a*) 3 *T. R.* 454.
(*b*) 5 *T. R.* 599.
(*c*) 7 *M. & W.* 512.; 9 *Dowl. P. C.* 739.
(*d*) 1 *N. C.* 502.; 1 *Scott*, 477.
(*e*) *Antè*, Vol. III. 785.
4 *Scott, N. R.* 402.
(*g*) 5 *Bingh.* 248.; 2 *M. & P.* 384.; affirmed in K. B. 10 *B. & C.* 826.; in *Dom. Proc.* 1 *Cl. & Fin.* 39.
(*h*) 14 *East*, 406.

The pleas, in substance, only state that certain persons formed an association for the purpose of trading in marble, and raised a capital by shares; but this is no offence at common law.

Talfourd Serjt. in reply. The second and fourth pleas disclose a sufficiently good ground of defence upon general demurrer. The grounds upon which the judgment of this court proceeded in *Duvergier* v. *Fellows* are in favour of the defendant. It was there held that the pretending to be possessed of transferable stock was pretending to act as a corporation. In this case the pleas shew that the parties not only pretended to act, but did in fact act, as a corporation. [*Cresswell* J. *Duvergier* v. *Fellows* was affirmed by the King's Bench upon error. (*a*) But it is not quite clear that the judgment of this court was adopted to the full extent. *Channell* Serjt. The judgment was indeed also supported in the House of Lords (*b*); but upon quite different grounds.] In *R.* v. *Webb* the particular association was held legal; at least the parties were held not to be liable to an indictment. But that was under peculiar circumstances. And the authority of *R.* v. *Webb* was doubted in *Kinder* v. *Taylor*. (*c*) A question arose in that case as to the legality of a company calling themselves the *Real del Monte* Mining Company; and Lord *Eldon* C. is reported to have said, "The question as to what was assuming to act as a corporate body, was rendered still more important to be decided, because it was impossible to read the 6 *G.* 1., and the clauses of exceptions contained in it, without seeing that the legislature thought itself bound to except even some legally chartered companies. The case of *R.* v. *Webb* was scanty in argument,

(*a*) 10 *B. & C.* 826.
(*b*) 1 *Cl. & Fin.* 39.
(*c*) *George on Joint-Stock Companies*, p. 46.

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and the common law was not considered in it, because that was an indictment upon the statute. He spoke with all respect for Lord *Ellenborough*, who had decided the case, and whose memory he venerated as a law-giver; but he should have been glad if his lordship had taken the trouble to state what was assuming to act as a corporation." [*Cresswell* J. Here the defendant has not taken the trouble to state what *he* means by acting as a corporation.] It is submitted that he has in terms stated sufficient to bring the case within the principle of *Duvergier* v. *Fellows*. Lord *Eldon* added, in *Kinder* v. *Fellows*, "For many considerations it would have been very fortunate if the court had then looked at this as a distinct question, and had been good enough to declare, 'this is not acting as a corporation, because, to act as a corporation, you must act so and so.' It now, however, became necessary to decide, either by legal judgment or by a declaratory act of parliament, what is the meaning of presuming to act as a corporation; and by whomsoever it was declared, not only what was doing, but what had been done, must be attentively regarded. It was for this reason he thought the case of *R.* v. *Webb* called for further explanation." And his lordship, after commenting upon the 6 *G.* 1., stated, that "he was of opinion,—and he had taken some trouble to consider the question,—that if it could satisfactorily be made out to a jury that a party was opening books, raising a premium upon the shares, and then took care to get himself out of the scrape, that was an indictable offence." *Josephs* v. *Prbrer* (*a*), and *Pratt* v. *Hutchinson* (*b*), are authorities to shew that a company which professes to raise and transfer stock is illegal. [*Tindal* C. J. When those cases were decided the 6 *G.* 1. was in full force.]

(*a*) 3 *B.* & *C.* 639.; 3 *D.* & *R.* 542.

(*b*) 15 *East*, 511.

The learned serjeant then proceeded to argue that e replications to the second and fourth pleas were d for multifariousness, and as involving an imma- ial issue. It was immaterial whether other persons re associated with the plaintiff and defendant, as there ght be a fraudulent company consisting of two parties ly. [*Tindal* C. J. It is not very likely. The 6 *G.* 1. ms to point to associations formed by great numbers persons. *Erskine* J. In order to render a proposition jectionable, is it sufficient that it is immaterial? Must not also tend to embarrass the opposite party? That ms to be the ground upon which *Regil* v. *Green* was ided.] If the contract was unlawful in its origin, the sequent application of the money would make no ference; *Thurman* v. *Wild.* (*a*) [*Cresswell* J. Supe the money had been originally lent for an unlawful rpose, and the plaintiff had repented and demanded k the money, but had afterwards sanctioned its imper application.] If the contract was originally unful he could not recover the money. This is an ion for money lent. It is a sufficient answer that it s lent in furtherance of an illegal contract. The subent application of the money is quite immaterial.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the rt.

The questions before us in this case arise on the reications put in by the plaintiff to the second, third, rth, and last pleas of the defendant. But as the third d last pleas were abandoned by the defendant upon e argument, and as we think the second and fourth leas are also bad in point of law, it will be unnecessary o say any thing as to the replications: and the second

(*a*) 11 *A. & E.* 453.; 3 *P. & D.* 289.

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and fourth pleas being pleaded in the same form, the one to the action generally, the other to the second count, it will be necessary to consider the first only of those pleas.

That plea is framed upon the very words of the statute 6 *Geo.* 1. *c.* 18. *s.* 19.. It states that the plaintiff and the defendant, and others, did illegally associate themselves together in an illegal undertaking, project, and attempt, tending to the common nuisance, prejudice, and inconvenience of the subjects of our lady the Queen in general, and great numbers of them in their trade and commerce. It is obvious, that, if the plea had stopped here, such a general allegation of an illegal association would not have been sufficient, even if the statute above referred to had been still in force and unrepealed: and consequently the plea proceeds to describe the particular illegal association intended, and alleges it to consist in this, that the plaintiff, the defendant, and those other persons, did act as a corporate body, and pretended to be a *trading corporation*, under the name of "The *Limerick* Marble and Stone Company," and did also then pretend to raise and transfer stock in the said company, and that the said stock consisted of 50,000*l.* divided into 500 shares of 100*l.*, and did pretend to transfer and assign shares in such stock, without legal authority by act of parliament, charter from the crown or letters patent under the great seal, or by any lawful authority whatever, to warrant such acting as a corporate body, or the raising of transferable stock, or the transferring shares therein. Now assuming, for the sake of argument, that this description would have been sufficient to bring the case within the statute, yet, as that clause of the statute has been expressly repealed by the 6 *Geo.* 4. *c.* 91., the question becomes this, whether such an illegal association is described on the face of this plea as to constitute, at common law, a nuisance, and to

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indictable as such. The raising and transferring of ock in a company cannot be held, in itself, an offence common law: such species of property was altogether known to the law in ancient times; nor indeed was it usage and practice until a short period antecedent to passing of the statute; as is evident from the preble to the 18th section, which recites that it is notous that these projects and undertakings, which it is object of the clause to put down, had been contrived d practised within the kingdom *since the 24th of June*, 18; evidently shewing that the act was looking to me grievance of *late* introduction. And as that clause s been repealed, we find no authority for holding that allegation that the parties raised and transferred ock is simply, and *per se*, without any statement of the ode by which it injures or defrauds the public, an inictable offence at common law. And, laying that allegation out of the way, the plea really states no more, in ubstance, than that the plaintiff and the defendant "and ther persons" (which allegation would be satisfied if here were two only in addition to themselves), pretended act as a trading corporation, under the name and style f "The *Limerick* Marble and Stone Company." The lea states no illegal mode or means by which they prended to act as a company, as, by usurping a common al, or the like; nothing more is stated than their asming the style and firm of a company. It is not even leged that this took place and was carried on in ngland, or within the Queen's dominions, which would em from the preamble to the 18th section of the statute have been necessary, at least, to constitute an offence nder that statute.

The case of *Duvergier* v. *Fellows* (*a*) has been cited, nd relied on as an authority in point that the mere

(*a*) 5 *Bingh.* 248.; 5 *M. & P.* 403.

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presuming to act as a corporation is of itself alone an illegal act, and indictable. It should be observed, however, that the plea in that case did not state simply the fact of the formation of a pretended corporate body, but the formation of it for a purpose confessedly illegal, namely, the purpose of enjoying the benefit of certain letters patent, by the condition annexed whereto the letters patent were to become void if assigned to more than five persons. And *this* is the precise ground upon which the judgment was affirmed both in the court of King's Bench and in the House of Lords, where the case was removed by writ of error; not to mention also, that, in the plea of the defendant in that case, so much of the detail and management of the pretended company was stated as might perhaps be sufficient to shew a project which would necessarily operate to the fraud and deceit of the subjects of this kingdom.

It is enough, however, to say, on the present occasion, that there is an absence in *this* plea of any statement of facts from which an illegality at common law is necessarily to be inferred; and, unless such common law offence appear sufficiently stated on the plea itself, we are not to infer it.

We think, therefore, the second and fourth pleas are also bad, and that judgment on the four special pleas must be given for the plaintiff.

Judgment for the plaintiff.

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Sir WILLIAM HENRY RICHARDSON, Knight, *v.* HENRY KENSIT the Younger. *Feb.* 8.

By the custom of a manor a fine was due on the admittance of a remainderman, whether admitted at the same time as the tenant of the particular estate, or during the continuance of such estate.

A., a copyholder in fee of the manor, devised certain copyhold premises to *B.* for life, remainder to *C.*, and *D.*, his wife, for life, with benefit of survivorship, remainder to *E.* for life, remainder to *F.* in fee. *B.* was admitted, paying a fine of full two years' value, and died. The custom gave to the lord, upon the admittance of *C.* and *D.*, three years' value, for a fine and a half (treating the wife, *D.*, as the party next in remainder), half a fine, being one year's value, from *E.*, and a quarter of a fine, being half a year's value, from *F.*: Held, that the mode of assessing the fine was reasonable; but

Held, also, that the fine, having been calculated without making a deduction for repairs, was unreasonable.

ASSUMPSIT brought by the lord of the manor of *Chipping-Barnet-and-East-Barnet*, for certain reasonable fines, alleged to have been duly assessed, and to be due and payable from the defendant to the plaintiff, for and upon the admittance of the defendant, according to the usage and custom of the said manor, into divers copyhold tenements, with the appurtenances, within and parcel of the said manor, into which the defendant had, by the plaintiff, before then, and whilst the plaintiff was lord of the said manor, been admitted, according to the usage and custom of the said manor, to hold the same, with the appurtenances, to the defendant as tenant in remainder, in fee, by copy of court-roll, at the will of the lord of the said manor, according to the custom of the said manor.

The defendant pleaded non assumpsit; whereupon issue was joined.

The cause came on to be tried before *Tindal* C. J., at the sittings for *Middlesex*, after *Michaelmas* term, 1841, when a verdict was found for the plaintiff for the damages laid in the declaration, subject to the opinion of the court on the following case, with liberty for the court to draw such inferences as a jury might draw; and it was referred to *J. A.*, Esq., barrister at law, to ascertain and

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state the amount of the annual value of the copyhold premises mentioned in the pleadings, and all questions touching the same, and any deductions or deduction claimed by the defendant as proper to be made in respect of such premises: and it was ordered that the arbitrator, if required by either party, should state, upon the face of his award, the finding as well as the principle of such finding, and that such award should be introduced into the special case: —

CASE.

Before and at the time of the admittance of the defendant and others as tenants, as hereinafter mentioned, the plaintiff was the lord of the manor of *Chipping-Barnet-and-East-Barnet*, in the county of *Herts*, and still is lord of the said manor.

Thomas Balshaw, being tenant in fee, according to the custom of the said manor, of three houses, and a close of land, within and parcel of the said manor, by his will, duly executed on the 25th of *February* 1830, devised the same to *Amy Lincoln* for her life, with remainder to *Henry Kensit*, and *Sarah Kensit*, his wife, during their lives, or to the survivor of them, and, at their decease, to *Susannah Sophia* (in the will called *Susannah*) *Kensit*, their daughter, during her life, and, at her decease, to the defendant in fee.

T. Balshaw, being such tenant as aforesaid, died on the 15th of *March* 1830, without having altered or revoked his said will; and at a court held on the 13th of *April* 1830, his death and his said will were presented, and the said *A. Lincoln* was admitted tenant to the said premises, and paid for a fine 40*l.*, as for two years' value thereof at that time.

A. Lincoln died on the 11th of *April* 1834.

At a court held the 17th of *April* 1838, the said *H. K.* the elder, and *Sarah* his wife, *Susannah Sophia* their

daughter, and the defendant, were admitted tenants, according to their estates and interests, under the said will. The entry on the court-roll of the admittance, after reciting the will of *T. Balshaw*, his death, and the admittance and death of *A. Lincoln*, proceeds as follows: "Now to this court come the said *H. Kensit* the elder, in his own person, and the said *S. Kensit*, his wife, and *Susannah Sophia* (in the said will called *Susannah*) *Kensit*, spinster, by the said *H. Kensit* the elder, their attorney, and the said *H. Kensit* the younger, in his own person, and humbly pray of the lord of the said manor, severally and respectively, to be admitted tenants to the premises whereof the said *T. Balshaw* died seised as aforesaid, according to their several and respective estates and interests therein, under and by virtue of the said will of the said *T. Balshaw* deceased. To whom the lord of the said manor, by his said steward, doth grant the same and deliver them, severally and respectively, seisin thereof, by the rod, — to the said *H. Kensit* the elder and *H. Kensit* the younger, in their own persons, and the said *S. Kensit* and *Susannah S. Kensit*, by the said *H. Kensit* the elder, their attorney, — to have and to hold the premises, unto the said *H. Kensit* the elder and *Sarah* his wife, for and during the term of their lives, and the life of the survivor of them, and, from and after the decease of the survivor of them, unto the said *Susannah S. Kensit* for and during the term of her life, and, from and after the decease of her the said *Susannah S. Kensit*, unto the said *H. Kensit* the younger (the defendant), his heirs and assigns for ever, by the rod, at the will of the lord, and according to the custom of the said manor, by the yearly rent of 10*d.*, fealty, suit of court, customs, and other services due, and of right accustomed. And the homage aforesaid, on their oaths, present that the premises aforesaid are of the annual value of 20*l.* And the fines payable to the lord were thereupon assessed

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in manner following, that is to say, the sum of 60*l.* for the estate and interest of the said *H. Kensit* the elder and *Sarah* his wife, the sum of 10*l.*, the fine for the estate and interest of the said *Susannah S. Kensit*, and the sum of 5*l.*, the fine for the estate and interest of the said *H. Kensit* the younger (the defendant); and the said parties were accordingly, in manner and form aforesaid, admitted tenants to the said hereditaments and premises; but their fealty was respited until" &c.

The case then set out numerous extracts from the court-rolls, which were relied upon on the part of the plaintiff, as shewing that, by the custom of the manor, a fine was payable on the admittance of a remainder-man, and also as shewing that the mode and principle upon which the fines had been assessed upon each successive remainder-man in this particular case, were reasonable. The instances given are fully commented upon in the argument and in the judgment.

The arbitrator made the following award, under the order of reference before mentioned:—

"I find, award, and state, that the improved annual value of the said copyhold premises, on the 17th day of April, 1838, was 16*l.* 8*s.* 1*d.* And, at the request of the plaintiff, I further state, that in ascertaining the said annual value, I have made the following deductions and no other, that is to say, 1*s.* 11*d.*, which I find, and state, to be a quit-rent payable to the lord for and in respect of the said premises, and also 4*l.* 10*s.*, which I find, award, and state to have been at that time, and still to be, the amount of the annual costs and expenses of repairs necessary to be done to the said cottages annually, in order to keep them in tenantable repair."

It is agreed that the court shall be at liberty to draw any such conclusions of fact, as to the existence or non-existence of any special custom within the

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is they may think the jury ought to have

uestion for the opinion of the court is, whe- plaintiff is entitled to recover in this action um of 5*l.* If the court shall be of opinion that tiff is so entitled, then the verdict is to be or the plaintiff, with 5*l.* damages, and costs of if the court shall be of a contrary opinion, nsuit is to be entered. (*a*)

points marked for were as follows: — plaintiff. First — ne extracts from the set out in the case nt evidence of the n the manor of *Chip- t-and-East-Barnet*, for the payment of remainder-man on nce to a copyhold. —Whether the fine r the lord, as stated e, was a reasonable

defendant. That ne from him to the manor, and that the is bad. The ad- f *Amy Lincoln*, the life, operated as an of those in re-

ndant's admittance, cessary or not, would f create a right to a erwise due (*Barnes Lev.* 308.). He was nly in respect of a nainder, and is not v liable to a *present* ll fine having been the admittance of *n*, as tenant for the estate, no fine can claimed on the ad- the remainder-man. If any fine can, on the admittance of such remainder-man, be demanded, a *full* fine cannot be demanded from him, or from those in remainder, nor can fines be claimed on their admittance during his life, on the scale of a full fine.

A full fine means, at the very utmost, two years' improved value; here, the full fine was estimated as on 20*l.* per annum improved value, whereas the improved value was only 16*l.* 8*s.* 1*d.* per annum. Three years' improved value, at 20*l.* per annum, are assessed as the fine on the admittance of Mr. *Henry Kensit* the elder and his wife.

The plaintiff's claim is informal in law, unless it appear that there is a special custom in this manor, — that after a tenant for life has been admitted and paid a full fine, the remainder-man is, on admittance, also liable to a full fine, and those in successive remainder on him, if admitted during his life, are also liable on such admittance, the first in succession to him, to half a full fine; the next to a fourth of a full fine; and so on. No such special custom is shewn.

The assessment is also ill, in

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The case was argued in Hilary term last. (a)

Bompas Serjt. for the plaintiff. The questions in this case are; first, whether the lord of the manor is entitled to call upon the remainder-man to be admitted and to pay a fine; and, secondly, whether the fine demanded on this occasion, was reasonable.

With regard to the first point, it may be conceded that *primâ facie* an admittance to a particular estate will be an admittance to the remainder; and it lies therefore upon the plaintiff in this case, the lord of the manor, to shew that he is, by the custom of the manor, entitled to a fine on the admittance of a remainder-man; *The Dean and Chapter of Ely* v. *Caldecott.* (b) Such a custom, however, is undoubtedly good; *Doe* d. *Whitbread* v. *Jenney.* (c) And the extracts from the court-rolls, notwithstanding some slight variations in the sums, which, in all probability, might easily be accounted for, shew, that in this manor the custom was, that the remainder-man should pay on admission half the fine that had been paid by the tenant of the particular estate; and the next remainder-man half the fine so paid by his predecessor. The cases of *Sheppard* v. *Woodford* (d) and *Wilson* v. *Hoare* (e) shew that such a principle of calculation, when warranted by custom, is unobjectionable. As to the reasonableness of the fine, the calculation has been made with reference to the full value of the premises at the time of the testator's death; but the defendant contends that deductions should be made in respect of repairs and other matters. There is no authority for

being on the premises generally, and not on each tenement separately.

(a) *Jan.* 19th, before *Tindal* C. J., *Erskine* and *Cresswell* JJ.

(b) 8 *Bingh.* 439.; 1 *M.* & *Scott*, 633.

(c) 5 *East*, 522.

(d) 5 *M.* & *W.* 608.

(e) 2 *B.* & *Ad.* 350.; 10 *A.* & *E.* 236.; 2 *P.* & *D.* 659.

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h deductions. In *Halton* v. *Hassell* (*a*) it
it fines were to be set according to the im-
e. (*b*) In *Grant* v. *Astle* (*c*) the rule seems
en laid down by Lord *Loughborough* that
were only to be made in respect of quit
e learned serjeant also referred to 1 *Watk.*
; *Com. Dig.*, tit. *Copyhold* (H. 4.)). It can-
ned that the premises will get out of repair,
uch the duty of the tenant to keep them in
is to attend the lord's court.

Serjt. (with whom was *J. Henderson*) for the
It is submitted, first, that the custom set up
is unreasonable; secondly, if it be not so,
it established in fact; and thirdly, that the
e premises is taken at too high a rate, by
; deductions for repairs.
ere a fine is arbitrary, the court will con-
easonable if it exceed two years' purchase;
that rule is not applicable where the fine is
custom, still there is no case where a fine
pported which has been based upon such a
as the present. In *Sheppard* v. *Woodford*,
. *Hoare*, the argument was, that the trustees
estate; but here, according to the ordinary
the remainder-man is in upon the admit-
tenant for life, and might have maintained
n that admittance. A fine of 40*l.* was paid
ncoln, the tenant for life; and 75*l.* is now
ned by the lord; that is, 60*l.* from *Henry*
lder and his wife, 10*l.* from *Susannah Kensit*,
i the defendant, making in all the sum of

. 1042.
pson v. *Clayton*,
8.; 6 *Scott*, 469.

(*c*) 2 *Dougl.* 722. 724. n.

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115*l.*, payable as a fine upon the whole *corpus* of the estate, which amounts to five years and three quarters' improved value. But a fine never could reach that sum on the computation in *Sheppard* v. *Woodford* and *Wilson* v. *Hoare*. According to those cases, a fine never ought to reach four years' purchase, though it may exceed two. The fine, therefore, is unreasonable.

Secondly, a custom is to be construed liberally, in favour of the tenant, and strictly, against the lord. *Watk. Copyh.*, 60. There is no other evidence of reputation in the case than what is contained in the court-rolls; which, although receivable, are not entitled to much weight. And the entries thereon only amount to evidence of the fact that fines have been paid on the admittance of a tenant for life, and also of a remainder-man; but such fines may have been taken on the principle of apportionment.

Thirdly, the amount of the fine is at any rate unreasonable in respect of the annual value claimed. The rule in *Halton* v. *Hassell* is not disputed; but the term "improved value" there used, must be taken to mean improved annual value; that is, the sum at which the property would let by the year. No deduction is asked in this case in respect of ornamental repairs, but only of such repairs as would render the premises wind and water-tight, such as a tenant might do, and deduct from his rent. It is said that a copyhold tenant is as much bound to repair as to attend his lord's court; but that is not correct with regard to a copyholder in fee who, it is submitted, is not responsible for permissive waste. *Cruise's Digest*, tit. *Copyhold*, ch. 3. sect. 15. (p. 299. 3d ed.)

Bompas Serjt. was heard in reply.

Cur. adv. vult.

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TINDAL C. J. now delivered the judgment of the urt.

In this case the plaintiff, the lord of the manor of ipping-Barnet-and-East-Barnet, on the 17th of *April* 38, admitted the defendant, as tenant, to a certain pyhold tenement, within, and parcel of, that manor, which he prayed to be admitted as tenant in remain- r, in fee, and upon such admission the lord claimed ine of 5*l.*

It appears upon the special case, that *Thomas Balshaw*, ng tenant in fee according to the custom of the manor, vised the tenement in question to *Amy Lincoln* for life, remainder to *Henry Kensit* and *Sarah* his wife, ring their lives and the life of the survivor, remainder *Susannah Sophia Kensit*, their daughter, for life, re- inder to the defendant in fee.

After the death of the testator, in 1830, *Amy Lincoln* s admitted tenant, and paid 40*l.* for a fine, as for two ars' value of the premises at that time, and died in 34. And on the 17th of *April*, 1838, the several rsons who claimed under the will, in remainder, came the lord's court, and prayed, severally and respec- ly, to be admitted, as tenants, to the premises; and, r a presentment by the jury that the premises were the annual value of 20*l.*, those several persons were itted to the respective estates in remainder, under said will. The fines were then assessed as follows; 60*l.* for the estate and interest of *Henry Kensit* the and *Sarah*, his wife; 10*l.* for the estate and in- st of *Susannah Sophia Kensit*; and 5*l.* for the estate interest of the defendant.

Upon this state of facts, two questions were made on this special case; first, whether the extracts from e court-rolls are sufficient evidence of the existence of custom in the manor for the payment of the fine by a

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remainder-man on admittance to a copyhold; secondly, whether the fine assessed is a reasonable fine.

Upon the first and general question, we cannot entertain any doubt but that, by the custom of this manor, a fine is due on the admittance of a remainder-man, whether he pray his admittance, and is admitted at the same time as the tenant of the particular estate, or whether his admittance take place during the continuance of such estate. The extracts from the court-rolls furnish numerous and repeated instances of such admittances, and of payment of fines thereon, and no instances to negative such custom.

It is the second question upon which the real dispute between the parties arises, viz., whether this is a reasonable fine, first, with respect to the mode and principle upon which it has been assessed upon each successive remainder-man; and, secondly, with respect to the principle upon which the annual value of the premises has been ascertained.

The principle on which the assessment has been made upon the tenant, of the successive estates in remainder is, to claim a fine amounting to a full two years' value from the tenant who takes the immediate estate; but as upon this occasion the husband and wife were jointly admitted for their lives and the life of the survivor, to consider the admittance of the wife as an admittance of one next in remainder, and to claim on their joint admittance, a fine and a half, or 60*l.*; to claim a fine of half the amount of that on the wife's admittance on the admittance of *Susannah Sophia Kensit* the next in remainder, that is, a fine of 10*l.*; and to claim a fine of half that amount on the admittance of the defendant, treating him as the fourth in remainder.

Now whether this mode or principle of assessing the fine with respect to tenant for life and remainder-man, is a mode which will bind the tenant, must be determined by reference to the custom of the manor; and,

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ongst the extracts from the rolls, there are instances which a tenant in fee has surrendered to the use of mself for life with remainder to *J. S.*, and where the nant and the remainder-man have been admitted on is surrender, and the remainder-man has paid half e fine which was paid to the lord on the original mittance of the surrenderee; some in which the tenant r life has been first admitted, and the remainder-man a subsequent period; some in which husband and ife have been admitted on the surrender of the husnd, on which occasion the wife has paid half the fine hich the husband paid on his original admittance; and, though in some of these instances the fine paid upon ie remainder-man's admittance has not been the prese half of the amount of that paid on the admittance f the tenant of the particular estate, being in some stances rather more, and in some rather less, yet we o not think such variations, which at this distance of me it may be difficult to account for, ought to prevent s from drawing the inference which we do draw, that here exists a custom in this manor of claiming a fine n the admittance of the remainder-man, to the extent of half the fine claimed on the admittance of the tenant of the particular estate (*a*); and, unless upon general grounds of law it would be unreasonable to extend such calculation beyond the admittance of the first remainder-man, we hold the mode of calculation adopted in the present case to be reasonable. The cases of *Sheppard* v. *Woodford* (*b*) and *Wilson* v. *Hoare* (*c*), recognise the reasonableness, in point of law, of a custom existing in a manor, to claim, upon the admittance of several joint-tenants, a full fine for the first, half that fine for the second, and a half of that half for the third,

(*a*) Vide *Peter* v. *Kendal*, 6 *B. & C.* 703.

(*b*) 5 *M. & W.* 608.

(*c*) 10 *A. & E.* 236.; 2 *P. & D.* 659. And see 2 *B. & Ad.* 350.

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and so on: and we think the same mode of calculation may reasonably be held to apply to the case of remainder-men, where there is a custom in the manor that after the first tenant, the next remainder-man shall pay a half fine.

The second question which has been raised as to the reasonableness of this fine, is, whether the deduction for the repairs ought to be allowed by the lord or not. The rule laid down by law has always been taken, at least since the case of *Halton* v. *Hassell* (*a*), to be this—two years *improved value* of the land, deducting quit-rents. What is the improved value of the premises, is therefore the question. If they are let at a fair rent to a tenant, the rent which he pays to his landlord will be the best evidence of the improved annual value. This, indeed, appears to have been taken for granted by the court in the case of *Dow* v. *Golding* (*b*). And if, upon such letting, the tenant undertakes to keep the premises in repair, such tenant, when he agrees to pay the rent, must have taken into his calculation the annual expenditure which the repairs will cost him, and will pay so much less to the landlord as such estimated annual repairs will amount to. In such case, therefore, the amount of the annual repairs would virtually and substantially be deducted out of the value; that is, the rent, which is the evidence of such value, is not ascertained and arrived at without making such deduction. So, again, if the premises are kept in the landlord's own hand, in estimating the value which the premises are of to him, it seems to us that the same process must be resorted to, and that one of the data of the calculation of actual value must be, an allowance for the ordinary annual expenditure necessary to keep the premises in tenantable repair. It is not so proper,

(*a*) 2 *Stra.* 1042. (*b*) *Cro. Car.* 196.

er, as it appears to us, to call this a *deduction* from nual value, as to consider it as a *necessary allowance* made in calculating the amount of that annual and we understand the finding of the arbitrator to it to that and nothing more. When the arbitrator m the question was referred, finds the *annual value* 16*l.* 8*s.* 1*d.*, we understand him to mean that such ould be the amount of the improved rent which a would pay if he took the repairs upon himself; ch value as the owner of the copyhold would from the premises, if the premises were in his ccupation, or if he let them and repaired them lf. (*a*) And we think the real amount of the benevalue to the tenant of the copyhold, amounts to m, and no more.

inking, therefore, that the sum of 20*l.*, which has ssessed as the improved annual value, is too large, e of opinion that the fine claimed is unreasonable; e therefore direct a non-suit to be entered.

Judgment of nonsuit.

(*a*) If the rent were taken t any deduction for , the five years' and a ne, receivable in this might amount to 115*l.* rental of 20*l.*, although the occupier paid to his landlord, the copyholder, only 2*l.* a year, 18*l.* being kept back for repairs. In such a case the fine would greatly exceed the value of the fee simple.

PARKER *v.* MARCHANT and Others.
SYKES *v.* Same.
Same *v.* DUKE and Others.
Same *v.* HOLMAN and Others.
Same *v.* KNIGHT and Others.

Devise in a will, anterior to the 1st of *January*, 1838 (*a*), as follows: — "As to my messuages, lands, tenements, and *real estate*, I devise unto *A.* and his heirs, *Whiteacre* and *Blackacre, and all other my messuages, lands, tenements, and hereditaments* which may not be herein particularly described or mentioned. And I do further bequeath to my wife all my jewels, plate, &c. and other goods, chattels, and effects whatsoever, as her own goods and chattels for ever, and appoint her sole executrix," &c. At the date of the will, and at his death, the testator was possessed of certain leaseholds, but had no other real estates than *Whiteacre* and *Blackacre*. Held, that the leaseholds did not pass to *A.*

THE following case was submitted for the opinion of the judges of this court, pursuant to an order made on the hearing of the above-mentioned causes, on further directions, by Sir J. L. KNIGHT BRUCE, V. C., bearing date the 8th of *March*, 1842. (*b*)

Robert Parker, Esq., was, at the date of his will hereinafter set forth, seised and possessed respectively of the following real and leasehold properties, and of no other real or leasehold property, that is to say:

Real Property. A freehold messuage or tenement and farm called the Great Lodge of *Otford* Park, together with the barns, &c., and appurtenances thereto belonging, and twenty-one several closes, &c. A freehold messuage or tenement and farm called the Place Farm, together with the granary, &c., and the ruins of the ancient castle and palace of *Otford*, yards, &c., and appurtenances thereunto belonging, and twenty-seven

(*a*) *Vide post*, 503. (*c*)

(*b*) See *Parker* v. *Marchant*, 1 *Y. & Coll.* 290.

s, &c., all which said several messuages, &c., the appurtenances are situate, &c., in the several hes, villages, or hamlets of *Otford* and *Kemsing*, ie of them, in the county of *Kent*. A freehold plot rcel of ground, together with the messuage, &c., on erected and built, being No. 18. in *Catherine* , in that part of the parish of *Walcot*, in the county *merset*, which lies without the jurisdiction of the f *Bath*. A freehold messuage or farm, &c., with ppurtenances situate, &c., in the parish of *Ifield*, in ounty of *Sussex*. A freehold messuage or farm, and appurtenances situate in the said parish of , in the said county of *Sussex*. A freehold messuage, and several pieces or parcels of land, &c., situate in arish of *Charlewood*, in the county of *Surrey*. One ided third part or share, and the half of one undivided third part or share, of and in a free- piece or parcel of meadow land, &c., one other of meadow land, &c., one other piece or parcel nd called &c., one other piece or parcel of land, hich pieces or parcels of land are situate in the h of *Hoo*, in the county of *Kent*. A freehold uage, &c., and nine several pieces or parcels of land, situate in *Cherington* and *Hargrave*, in the county *ffolk*. A freehold messuage &c., situate in *Heg-* , otherwise *Hesset*, in the county of *Suffolk*, &c. All copyhold lands, &c., situate in *Hessett*, in the ty of *Suffolk*, and holden of (*a*) the manor of *Rougham* the members. All those copyhold lands, &c., e in *Hargrave*, in the county of *Suffolk*, and holden the manor of *Hargrave*. And all those copyhold , &c., situate in *Hessett*, in the county of *Suffolk*, olden of (*a*) the manor of *Heggesett* or *Hessett*. he case then set forth several leasehold properties.)

(*a*) Properly "within and parcel of."

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The said *Robert Parker* continued seised and possessed of the above real and leasehold properties respectively until and at the time of his death, and did not acquire any additional real or leasehold property in the interval. All the above real estates are mentioned or described in the will of the said *Robert Parker* hereinafter mentioned.

The said *Robert Parker* made his will, which was executed and attested so as to pass real estates by devise.

(A copy of the will was then set forth, the material clauses of which are given in *Knight* v. *Selby*. (*a*)

The said *Robert Parker* made a codicil to his will. (A copy of the codicil was set out. The testator thereby bequeathed sums of money to different parties)).

The said *Robert Parker* died on the 27th day of *March*, 1837, without having revoked or altered his said will, except so far as the said will may have been revoked or altered by the said codicil, and without having revoked or altered the said codicil.

The executrix assented, without prejudice to any question of construction, to all such bequests as were made by the will, to the said Sir *Timothy Shelley* and Sir *John Shelley Sidney*.

The question upon the above case is — whether the leasehold properties hereinbefore mentioned, or any and which of them, passed under the said will to the Sir *Timothy Shelley* and Sir *John Shelley Sidney*.

The case was argued in last *Hilary* term (18th of *January*) by

Channell Serj. (with whom was *Stone*) for the defendants. The leasehold property of which the testator was possessed, is comprised under the words "and all other my messuages, lands, tenements, and heredita-

(*a*) *Antè*, Vol. III. 92.; 3 *Scott, N. R.* 409. See also *Parker* v. *Marchant*, 1 *Y.* & *Coll., Chancery*, 290.

ments, which may not be herein particularly described or mentioned," and passed therefore to the trustees. *Rose* v. *Bartlett* (*a*), which is a leading case upon this subject, will be mainly relied upon by the other side. It was there decided that "if a man hath lands in fee and lands for years, and demiseth all his lands and tenements, the fee-simple lands pass only, and not the lease for years. And if a man hath a lease for years and no fee simple, and deviseth all his lands and tenements, the lease for years passeth; for otherwise the will should be merely void." The second part of this proposition has been acted upon, even beyond the letter; *Day* v. *Trig* (*b*); but the first part, though it has been subject at various times to judicial criticism; *Lowther* v. *Cavendish* (*c*), *Addis* v. *Clement* (*d*), *Turner* v. *Husler* (*e*); has been upheld in other cases; *Knotsford* v. *Gardiner* (*g*), *Chapman* v. *Hart* (*h*), *Thompson* v. *Lawley* (*i*); and cannot, therefore, now be disputed. But the question is, whether the doctrine is to be carried further. Here the intention of the testator is clearly expressed, of disposing of his "messuages, lands, tenements, and real estate;" he then proceeds to dispose of his real estate *nominatim*, and after that he bequeaths all *other* his messuages, &c., not therein described. It cannot be supposed that he did not mean all his property, of whatever description, to pass under this devise; and the court will, if possible, give full effect to the intention of the testator; *Doe dem. Humphreys* v. *Roberts*. (*k*) The clause "all other my messuages," &c. will be wholly inoperative, unless it be held to refer to the leasehold property. The terms of the residuary bequest to the wife, of all "other

(*a*) *Cro. Car.* 292.
(*b*) 1 *P. W.* 286.
(*c*) *Ambl.* 356.; 1 *Eden*, C. C. 99.
(*d*) 2 *P. W.* 456.
(*e*) 1 *Bro. C. C.* 78.
(*g*) 2 *Atk.* 450.
(*h*) 1 *Ves.* sen. 271.
(*i*) 5 *Ves.* jun. 476; 2 *Bos. & Pull.* 303.
(*k*) 5 *B. & Ald.* 407.

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goods, chattels, and effects whatsoever," including plate, linen, china, &c., might be sufficient, of themselves, to pass leaseholds; but they are less adapted to that purpose than the words of the clause referred to. It was held in *Lane* v. *Lord Stanhope*(*a*), that under a devise of all the testator's "manors, messuages, houses, farms, hereditaments, and real estate whatsoever," a leasehold estate passed, the testator's intention being clear from the whole tenor of the will.

The learned serjeant also referred to *Goodtitle dem. Paul* v. *Paul*(*b*), *Doe* v. *Williams*(*c*), and 2 *Powell* on Devises by *Jarman*, cap. 8. p. 127., where most of the cases on the subject are collected.

Talfourd Serjt. (with whom was *Morley*) for the plaintiff (the executor of the testator's widow). The leasehold property did not pass to the trustees. This case is governed by the rule in *Rose* v. *Bartlett*. Even the words "real estate" will not pass leaseholds; *Davis* v. *Gibbs*(*d*), *Whitaker* v. *Ambler*.(*e*) The ordinary rule of construction must be applied to this will. The expression "my messuages, lands, &c., which may not be herein particularly described or mentioned," has reference to some *possible* misdescription or omission of those he had enumerated, but certainly not to a distinct portion of his property, such as the leaseholds were. There was, in fact, a misdescription as to the real property, the case finding that the lands described by the will as "situate at *Otford* in the county of *Kent*" are in reality situated in the parishes or hamlets of *Otford* or *Kemsing*, or one of them. The leaseholds are included in the residuary bequest to the wife, so that no part of the will is inoperative or inconsistent. The decision in

(*a*) 6 *T. R.* 345.
(*b*) 2 *Burr.* 1089.
(*c*) 1 *H. Bl.* 25.
(*d*) 3 *P. W.* 26.
(*e*) 1 *Eden*, 151.

Lane v. *Lord Stanhope* proceeded upon the ground that the testator bequeathed his "farms;" and the land in dispute was a farm, partly leasehold, and partly freehold, and the whole of which had time out of mind been let to one tenant. *Pistol* v. *Richardson* (*a*), and *Watkins* v. *Lea* (*b*), are also authorities that leaseholds do not pass under a devise like the present.

Channell Serjt. in reply. The words in *Davis* v. *Gibbs* and in *Whitaker* v. *Ambler* were clear and explicit, giving the whole of the personal estate (including leaseholds) to another devisee. But here, the leaseholds are not devised specifically to the widow; and the general bequest to her is restricted by the gifts which precede it.

Cur. adv. vult.

The following certificate was afterwards sent:—

"This case has been argued before us; and we are of opinion that neither of the leasehold properties therein mentioned, passed, under the testator's will, to Sir *Timothy Shelley* and Sir *John Shelley Sidney*.

"*N. C. Tindal.*
"*T. Erskine.*
"*W. H. Maule.*
"*C. Cresswell.*" (*c*)

(*a*) 2 *P. Wms.* 459 n.
(*b*) 6 *Ves.* 633.
(*c*) This certificate was confirmed, after argument, by Sir *J. L. Knight-Bruce* V. C. (*March* 7th.)

But now by s. 26. of 1 *Vict.* c. 26., in wills made on or after the 1st of *Jan.* 1838., a devise of the *land* of the testator, or of the *land* of the testator *in any place*, or *in the occupation of any person*, mentioned in his will, or otherwise described in a general manner, and any other general devise, which would describe a customary, copyhold, or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

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MATTHEW LYON *v.* WILLIAM HAYNES, JOHN HUNT, JAMES PICKFORD BLOOR, WILLIAM ECKERSLEY, JOHN HAIGH, ALLEN ROBINS, and ALEXANDER OGILVIE.

February 8.

A. and *B.*, *C.*, and *D.*, and others, carried on the business of bankers, under the provisions of the 7 *Geo.* 4. *c.* 46., for some years prior to and upon the 29th of *August*, 1839, upon the terms contained in two deeds of the 1st of *July*, 1834, and the 30th of *August*, 1836, the former deed stating the circumstances under which, and the manner in which, the company might be dissolved at an extraordinary general meeting of the shareholders, called for that purpose by a certain board of directors, of which *B.*, *C.*, and *D.* were members. In the company *A.* held 100 shares of 10*l.* each. The board called an extraordinary general meeting of the shareholders, to be holden on the 29th of *August*, 1839, pursuant to the provisions of the deed of 1834. At the meeting so called, the shareholders present passed resolutions, in conformity with the provisions of the deed of 1834,—that the company was thereby dissolved; that the winding up of its affairs should be entrusted to the then board of directors, with power to employ and pay for such assistance as might be necessary; that any three directors might act; that the assets should be realised with all convenient speed, and that the portion not required to meet the engagements of the company should be divided amongst the shareholders ratably, in such dividends as the directors might deem fit; a dividend to be declared at least once in every six months; a copy of the proceedings and resolutions to be transmitted to each shareholder; no transfer to parties not already shareholders to be permitted. No shareholder present at the meeting was desirous of continuing the concern. Neither *A.* nor *B.* was present at the meeting, but a copy of the state of the said proceedings and resolutions was transmitted to *A.* and the other shareholders. From the 29th of *August* 1839, the business of the company, except so far as was necessary for winding up the affairs, was discontinued, and *B.* and *C.* and *D.*, in pursuance of the said resolutions, proceeded to wind up the affairs of the company.

ASSUMPSIT. The first count of the declaration stated, that before the making of the defendants' promise, the plaintiffs and the defendants, and divers other

Held, that the company was duly dissolved, and that, notwithstanding the power to wind up the concern, an allegation in a declaration that the company had altogether ceased and determined, was correct.

Held, also, that the partnership having been dissolved, the shareholders present had no authority to pass resolutions binding those who were absent, and that such resolutions could only be considered as an agreement by and amongst the individual parties present, and did not support an allegation in a declaration that the agreement was by and between *all the shareholders*.

Held, also, that an allegation that *B.* and *C.* were allowed and permitted to realise, and were entrusted with, the assets of the company, by the other shareholders, was not supported by the facts.

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ons, being more than six, had for three years carried ogether the business of bankers in *England*, with in capital, and upon certain terms under and by te of, and according to, the provisions of the o. 4. c. 46., and were called and known by the name "The Northern and Central Bank of *England*;" according to certain of the said terms, the plaintiff, defendants, and several other persons, whilst carry- on business together as aforesaid, were respectively ers of, and possessed, divers shares in the capital of said bank, which capital was, during the same time, led into shares of 10*l.* each, and, amongst others, plaintiff was, during the same time, and from thence the making of the promise thereinafter mentioned, the instalment or dividend thereinafter mentioned g deemed fit and becoming due and payable, and thence thitherto, the lawful holder of, and pos- ed of, divers, to wit, one hundred of the said shares he said capital; that the plaintiff, the defendants, the said other persons so carrying on business ther and being such holders of shares as aforesaid, tly before the making of the promise thereinafter tioned, to wit, on the 29th of *August* 1839, the said , and the said business and trade thereof, had been *were duly dissolved, and altogether ceased and de- ined*; that the defendants, before and at the time of said dissolution, had been and were shareholders as esaid in the said capital, and directors of the said , and afterwards, to wit, on, &c., a certain general ting was held of the several persons shareholders in

eld, also, that the resolutions contained no contract upon which any right of n arose, even as between *B.*, *C.*, and *D.*, and the other shareholders present at neeting, or as between *B.*, *C.*, *D.*, and *A.*

he directors of a dissolved joint-stock company who, at the request of the eholders, undertook the winding up of the concern, were held not to contract w with the shareholders for the due performance of the terms upon which winding up of the concern was to take place.

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the said capital of the said bank, and members thereof at the time of the said dissolution; that at the said meeting it was, amongst other things, agreed by and amongst the said shareholders and members that the assets of the said bank should be realised with all convenient speed, and that such portion of them as might not be required to meet the engagements of the said bank should be divided amongst the said shareholders ratably, and in proportion to the said shares respectively held by them as aforesaid, in such dividends as the directors might from time to time deem fit, a dividend to be declared at least once in every six months; that thereupon then, in consideration of the premises, and that the defendants, then being directors as aforesaid, were then, at the request of the defendants, *allowed and permitted to realise, and were then entrusted with, the assets of the said bank* by the said other shareholders of the said capital and members of the said bank, for reward to them, the defendants, in that behalf, the defendants then promised the said several shareholders and members respectively to realise the said assets with all convenient speed, and to divide such portion of them as might not be required to meet the engagements of the said bank, amongst the said shareholders ratably, and in proportion to the said shares respectively held by them, in such dividends as the defendants might from time to time deem fit; a dividend to be declared at least once in every six months.

First breach: that, although from the time of the said meeting the defendants were allowed and permitted to realise, and were entrusted with, the said assets of the said bank, and although the defendants did afterwards, to wit, on the 27th of *February* 1840, realise a large amount, to wit, one half thereof, and although a large portion of that amount, amounting to a large sum, to wit, 300,000*l.*, was not then, or at any subsequent time,

ired or necessary to meet the engagements of the bank, and the same portion was sufficient, when di- l amongst the said shareholders according to the said ement and promise, to allow to each shareholder an lment or dividend of 10*s.* in respect of every one of said shares respectively held by them, and although defendants did, on, &c., deem fit that such an in- ent or dividend of 10*s.* in respect of every one of said shares so respectively held by each and every e said shareholders should be paid to, and divided ngst, the said shareholders on, &c., and although defendants were afterwards, to wit, on, &c., requested e plaintiff, still being and continuing such share- er as aforesaid, to pay him the said instalment or lend due and payable in respect of the said shares eld by him as aforesaid, amounting in the whole to ge sum of money, to wit, 50*l.*, according to the ise of the defendants, of all which premises the ndants afterwards, to wit, on, &c., had notice, yet defendants did not nor would declare to or pay the ntiff the said instalment or dividend, or any part eof, but then and from thence thitherto neglected refused so to do.

econd breach of the same promise: that although a the time of the said meeting, the defendants were llowed and permitted to realise, and were entrusted , the said assets as aforesaid, and although the de- lants did afterwards, and after the expiration of the first six months from the said agreement and pro- e, to wit, on the 27th of *February* 1840, realise a e amount, to wit, one half thereof, and although a e portion of that amount, amounting to a large sum, wit, 300,000*l.*, was not then, or at any subsequent e, required or necessary to meet the engagements of said bank, and the same portion was sufficient, when ided amongst the said shareholders as aforesaid, to allow

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to each said shareholder an instalment or dividend of 10*s.* in respect of every one of the said shares respectively held by him being so divided as aforesaid, and although the defendants did, in part performance of their said promise, within the two first six months after the said meeting and promise, deem fit to declare, and did declare, two instalments or dividends, according to their said promise; of all which premises the defendants afterwards, to wit, on, &c., had notice, yet the defendants did not nor would, within the third space of six months from the said agreement and promise, or at any other time afterwards, although the said space had elapsed long before the commencement of this suit, deem fit to declare or declare any instalment or dividend upon or in respect of the said shares as aforesaid, according to their said agreement and their said promise, but wholly neglected and refused so to do, by means whereof the plaintiff had lost, and been deprived of, the said instalment or dividend of 10*s.* in respect of every share held and possessed by him as aforesaid, which he might, and otherwise would, have been entitled to, and had been otherwise damnified.

The declaration also contained a count for money had and received.

The defendants pleaded, first (to the whole declaration), non assumpsit; secondly (to the first count), that the plaintiff was not the lawful holder, nor possessed, of the said shares in the said capital in the said first count mentioned or any of them, *modo et formâ*; concluding to the country; thirdly (to the first count), that the said bank and the said business thereof had not been nor was duly dissolved, nor had the said bank and the said business thereof ceased and determined, nor did the same cease or determine, concluding to the country; fourthly (to the first count), that it was not agreed by and amongst the said shareholders

and members at a general meeting of the said shareholders and members, *modo et formâ*; concluding to the country; fifthly (to the first count), that the defendants were not allowed or permitted to realise, nor were they entrusted with, the assets of the said bank, *modo et formâ*; concluding to the country; sixthly (to the first breach in the first count), that the defendants did not realise the said amount in the first count mentioned, or any part thereof, *modo et formâ*; concluding to the country; seventhly (to the first breach in the first count), that the said portion of the said amount so realised as in the first count in that behalf mentioned, was required and necessary to meet the said engagements of the said bank, and that there never was any portion of the said amount, not being required or necessary to meet the engagements of the said bank or company, which was sufficient when divided, as in the first count mentioned, to allow to each shareholder such instalment or dividend as is in the first count in that behalf mentioned, *modo et formâ*; concluding to the country; eighthly (to the first breach in the first count), that the defendants did not deem fit that such an instalment or dividend should be paid and divided amongst the said shareholders, *modo et formâ*; concluding to the country; ninthly (to the said first breach), that the defendants had no notice of the said several premises, *modo et formâ*; concluding to the country; tenthly (to the said first breach), that the defendants did, on the 27th of *February* 1840, declare to, and pay, the plaintiff the said instalment and dividend; concluding to the country; eleventhly (to the second breach in the first count), that the defendants did not realise the amount in the said second breach in that behalf mentioned, or any part thereof, *modo et formâ*; concluding to the country; twelfthly (to the second breach in the first count), that the portion in the said second breach mentioned, of the said amount was

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required and was necessary to meet the engagements of the said bank, and that there never was any portion of the said amount not being required and necessary to meet the said engagements, sufficient, when divided amongst the said shareholders as aforesaid, to allow to each shareholder such instalment or dividend as in the said second breach in that behalf mentioned; concluding to the country; thirteenthly (to the second breach), that the defendants had not notice of the several premises *modo et formâ*; concluding to the country; fourteenthly (to the second breach), that the defendants did, within the third space of six months in the second breach mentioned, and before the commencement of this suit, to wit, on the 31st of *December* 1840, deem fit to declare, and did declare, a certain instalment and dividend of 10*s.* upon and in respect of the said shares in the said bank; concluding to the country; fifteenthly (to the two last counts of the declaration), that after the accruing of the causes of action in the declaration mentioned, and before the commencement of this suit, to wit, on, &c., the defendants paid to the plaintiff a large sum of money, to wit, the money in the two last counts of the declaration mentioned, in full satisfaction and discharge of all the causes of action in those counts mentioned, which the plaintiff then accepted and received of and from the defendants, in such full satisfaction and discharge of the causes of action in those counts mentioned. Verification.

The plaintiff took issue upon the last plea, and joined issue upon the other pleas.

At the trial a special verdict was found, which stated the following facts:—

"Divers persons, to the number of one hundred and upwards, after the passing of the 7th *Geo.* 4. *c.* 46., to wit, on the 1st *July*, 1834, commenced carrying on together, and from thence until the 29th of *August*, 1839, carried on together, and were then carrying on together

in partnership as a company, by virtue and in pursuance of the said act, the business of bankers in *England*, by the name and under the style of "The Northern and Central Bank of *England*," with certain capital and upon certain terms contained in a deed of settlement of the said bank, bearing date the 1st of *July*, 1834, and a supplementary deed of settlement containing, amongst others, the clause following: —

"That if at any time hereafter it shall appear to the board of *Manchester* directors, that losses have been sustained or incurred by the company, not only to the whole amount of the fund hereinafter mentioned, called 'The Reserved Surplus Fund,' but also to the amount of one fourth part of the capital which, for the time being, shall have been actually advanced and paid up by the proprietors (and for the purposes of ascertaining the amount of such losses it shall not be necessary for the said board of directors to take into their calculation or account any rise or fall which may have taken place in the price of any of the parliamentary stock or public funds of *Great Britain* or *Ireland*, in or upon which any part of the funds or moneys of the company may have been invested or placed, but such stocks or funds shall be calculated at the cost price), then the said board of directors shall, and they are hereby required to, call an extraordinary general meeting of the proprietors, for the purpose of taking into consideration the propriety of dissolving or continuing the company; and the directors shall submit to such meeting a full and general statement of the affairs and concerns of the company; and it shall thereupon be lawful for any one proprietor personally present at such meeting, in writing, to require that the company be dissolved; and the company shall therefrom be dissolved accordingly, unless such a number of the proprietors personally present at the meeting as shall amongst them be entitled to two

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thirds of the votes to be given at any ballot as aforesaid, shall be desirous of continuing and carrying on the said concern, and shall then and there, in writing, undertake so to do, and to purchase the shares of the dissentient proprietors at the then value thereof, and to indemnify the dissentient proprietors against all future losses of the company and from the existing debts and engagements thereof, such value and the nature of such indemnity to be ascertained, in case of difference, by reference to arbitration, as hereinafter mentioned, and on such undertaking being given, the dissolution of the company shall be suspended for the space of sixty days next after such meeting; and if within that time the purchase of the shares of the dissentient proprietors shall be completed in manner hereinafter expressed, then such dissolution shall not take place; and the purchase of the last-mentioned shares shall be considered as completed for the purposes of this provision whenever the said proprietors proposing to continue the company as aforesaid shall, by writing, having given notice to the dissentient proprietors that they are prepared to pay the purchase money for the said shares, on application by the parties entitled thereto for the same, at the banking-house of the company in *Manchester*, and shall, in accordance therewith, have actually paid the same to such of the parties as shall have applied for the same, or, in case of difference as to the amount of such purchase-money, shall have offered to refer the question of such amount to arbitration as aforesaid, and have proceeded in such arbitration, and have complied with the award made therein, or have been prevented from so doing by the neglect or default of the other party, and the company, as reduced or newly constituted from time to time, shall be liable to dissolution or to continuance from time to time, in like

nner, and under and subject to the same or the like egulations as aforesaid."

The deed of settlement also contained the clause following:—"That all the directors, trustees, public officers, local directors, and other officers, for the time eing, of the company, shall be indemnified and saved armless out of the funds, or property of the company, om and against all costs, charges, losses, damages, nd expenses which they respectively shall or may sus- in, pay, or incur in or about any action, suit, proceedg, or arbitration to be brought, commenced, carried, prosecuted, defended, or entered into, by the order or irection of the board of *Manchester* directors, or in any ise relating thereto, respectively, or otherwise in or about e execution of their respective offices or trusts, except ch costs, charges, losses, damages, and expenses, as all happen by or through the wilful neglect or default any such directors, trustees, public officers, local ectors or other officers respectively; and that the ectors, public officers, local directors, trustees, or er officers for the time being of the company, and h and every of them, their, and each and every of ir heirs, executors, administrators, and assigns, shall charged and chargeable only for so much money as y and every of them shall, respectively, actually reive by virtue of their respective offices or trusts, and at any one or more of them shall not be answerable, or ccountable, for the other or others of them, or for the cts, receipts, neglects, or defaults of the other or others f them, but each of them for his own respective acts, eceipts, neglects, and defaults only; nor shall they or ny of them be answerable or accountable for any person r persons who may be appointed by the said board of irectors to be the collector or collectors of the rents, rofits, or annual produce of the houses, estates, or ther property, for the time being, of the company, or in

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whose hands the same or any of the moneys of the company shall or may be deposited or lodged for safe custody, or for the insufficiency or deficiency of the title to any houses, estates, or other property which may from time to time be purchased by, or by the order of, the said board of directors, for or on behalf of the company, or for the insufficiency or deficiency of any security or securities in or upon which any of the moneys shall or may be placed out or invested by or by the order of the said board of directors, or for any misfortune, loss, or damage which may happen in the execution of their respective offices or trusts, or in relation thereto, respectively, unless the same shall happen by or through their own wilful neglect or default respectively."

The capital of the bank and of the said persons so carrying on together the said trade or business of bankers, was, during all the time aforesaid, that is to say, from the time when the said trade or business was so as aforesaid commenced to be carried on until the day of the dissolution thereof as hereinafter mentioned, divided into divers shares of 10*l.* each; and the plaintiff, before and at the time when the said bank and the said trade or business were so as aforesaid dissolved, was, and during all the time hereafter mentioned continued to be, and yet is, the lawful holder of one hundred of the said shares.

The carrying on of the said trade or business before the said dissolution thereof, was superintended and managed by the directors of the company according to the terms of the deed of settlement, and the defendant *William Smith*, before and at the time of such dissolution, was the holder of divers of the said shares of the said capital, and managing director of the company, and the other defendants were then also respectively holders of divers of the said shares of the said capital, and respectively directors of the said company.

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The board of *Manchester* directors of the company, afterwards and upwards of fourteen days, and not more than twenty-one days, before the time for the holding of the general half-yearly meeting next hereinafter mentioned, to wit, on the 10th of *August* 1839, called a general half-yearly meeting of the proprietors of and in the company, in manner directed by the deeds of settlement, to be holden on the 29th of *August* in the year aforesaid; and because it appeared to the board of *Manchester* directors that losses had been sustained or incurred by the company, not only to the whole amount of the reserved surplus-fund mentioned in the deed of settlement, but also to the amount of one fourth part of the capital which had then actually been advanced and paid up by the proprietors of the said company, the said directors called an extraordinary general meeting of the proprietors of and in the said company, in manner in that behalf directed by the said deed of settlement, to be holden on the 29th of *August* in the year aforesaid. The said general half-yearly meeting of the proprietors of and in the said company was in due manner holden, to wit, at *Manchester* aforesaid, pursuant to the said call in that behalf. At this meeting divers shareholders of and in the company, to the number of one hundred and sixty, or thereabouts, in the whole, and including the defendants *Haynes*, *Hunt*, *Boor*, *Smith*, *Eckersley*, *Robins*, and *Ogilvie* attended, and were respectively present at, the said meeting: but neither the plaintiff, nor the defendant *John Haigh*, attended or was present thereat.

At that meeting a certain report of the said directors was openly read in the presence and hearing of the several persons so there present as aforesaid; which report was and is to the purport and effect following; that is to say,—

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"Report of the Directors of the Northern and Central Bank of *England*.

"*William S. Stell*, Chairman.
"*William Haynes*, Deputy Chairman.

"*William Eckersley.*	*Alexander Ogilvie.*
"*John Haigh.*	*Allen Robins.*
"*John Hunt.*	*William Smith.*

"*Manchester*, 29th of *August* 1839.

"The shareholders of the Northern and Central Bank of *England* having been informed, by circular bearing date the 16th ult., of the circumstances under which the committee appointed at the general meeting of the 1st of *May* last, had assumed the office of directors, it simply remains that they should be put in possession of the result of the examination of the books and affairs of the company. In estimating the assets the directors have placed a value, as nearly as could possibly be ascertained, on each separate bill or other security, as well as on every balance of open account.

	£	s.	d
"By the general balance-sheet, the amount appearing as the paid-up capital on 69,757 shares at 10*l.* is - - - -	697,570	0	0
"And the balance, at credit, of undivided profits - - -	133,927	4	4
Making the total - -	831,497	4	4

"The actual assets of the company may, at the present time, be reported to consist of—			
"Cash on hand and on deposit at call in other banks - -	74,060	8	10
"Bankers' and other approved bills - - - -	39,841	2	9
"Real estate, mortgages, bills of exchange, bank-shares, and other securities, valued at - -	142,077	17	9
"Outstanding balances on open accounts, valued at - -	126,642	14	7
	382,622	3	11
"From which must be deducted, for notes still in circulation and other liabilities of the company -	8,433	11	1
Making a net sum of -	374,188	12	10
"Being at the rate of £5 7 3 per share on 69,757 shares, but leaving an estimated deficiency of -	457,308	11	6

"From the care with which the valuations have been made, there is every reasonable ground for believing that the whole of the above sum of £374,188 12 10 will, by proper attention, be ultimately realised.

"The deficiency of £457,308 12 10 being, however, not only to the full extent of the surplus fund of £133,927 4 4, but of more than one-fourth of the paid-up capital of £697,570, there has remained no other course for the directors than, in conformity with the requirements of the deed of settlement, to convene an extraordinary general meeting of the shareholders, for the purpose of taking into consideration the propriety of dissolving or continuing the company.

"*William S. Stell*, Chairman."

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The report of the directors having so as aforesaid been read at the said general half-yearly meeting, the said several shareholders of the said company then and there assembled did make and pass a certain resolution, to wit, "That the report so read as aforesaid be received, and entered on the book of proceedings, and that it be printed, and a copy sent to each shareholder."

Immediately after the holding of the said general half-yearly meeting of the said proprietors, that is to say, on the day and at the hour and at the place specified and fixed for the holding the said extraordinary general meeting of the proprietors, to wit, on the 29th of *August*, in the year last aforesaid at *Manchester* aforesaid, the said extraordinary general meeting of the proprietors of the company was, in due manner, holden, in pursuance of such call on the part of the said *Manchester* board of directors as aforesaid, and to the terms and provisions of the deeds; at which extraordinary general meeting such and the same parties and none other, attended and were present, as had so as aforesaid attended, and been present, at the said general half-yearly meeting. At the said extraordinary general meeting so then and there holden aforesaid, the said report of the directors, and the said resolutions so made and passed at the said general half-yearly meeting as aforesaid, were then and there, in the presence and hearing of the persons so then and there present as aforesaid, openly read; and the directors of the company did then and there submit to the said extraordinary general meeting and to the several persons then and there present, a full and general statement of the affairs and concerns of the company, whereby it appeared, and was the fact, that losses had been sustained and incurred by the company, not only to the whole amount of the reserved surplus-fund in the deed of settlement mentioned, but also to the amount of the one-fourth part of the capital actually advanced and paid

e proprietors of the company; and thereupon *Hazledine* then and there, being a holder of ares in the said company, did, in the presence iid persons so then and there present, deliver a writing to the chairman at the said extraor- neral meeting, thereby requiring that the said should be dissolved, which said notice was n then and there openly read; whereupon it and there resolved by the several persons then e present, — first, that in conformity with the iisition of the said *John Hazledine*, the said was thereby dissolved; secondly, that the up of the affairs of the company should be to the then present board of directors, with them to employ, and pay for, such assistance as necessary for that purpose, and that any three should be empowered to act as a quorum; that the assets of the company should be vith all convenient speed, and that such portion is might not be required to meet the engage- the company, should be divided amongst the lers ratably, and in proportion to the shares ely held by them, in such dividends as the might, from time to time, deem fit, a dividend eclared at least once in every six months; that a copy of the said proceedings and reso- ; the said extraordinary general meeting should iitted to each shareholder, and that thenceforth er of shares, to parties not already shareholders, e permitted.

mber whatever of proprietors personally present id meeting was desirous of continuing and car- the said concern, or did in writing undertake). A copy of the said proceedings and reso- as well of and at the said general half-yearly as of and at the extraordinary general meeting,

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was in due manner transmitted to the plaintiff and to other the shareholders of and in the company; and the said trade or business so theretofore carried on as aforesaid by the company, on and from the said 29th of *August* 1839, was, and thence hitherto hath been, wholly discontinued, save and except so far as was absolutely necessary for the purpose of winding up the affairs of the company.

The defendants, so being such directors as aforesaid, thereupon, in pursuance, and by virtue, of the said resolutions at the said extraordinary general meeting as aforesaid, did proceed to the winding up of the affairs of the company, and were, by the other shareholders of the said capital and members of the said company, permitted to proceed in realising, and did in fact proceed in realising, the assets of the said company with all convenient speed, and within six months next after the passing of the said resolution for the dissolution of the company, to wit, on the 1st of *October* 1839, found, and the fact was, that they had sufficient cash in hand belonging to the company to repay the proprietors thereof *1l.* per share on 69,757 shares in the company, and the defendants, being such directors as aforesaid, thereupon afterwards, to wit, on the day and year last aforesaid, gave and sent to the plaintiff and other the shareholders of and in the company, a certain notice, to the purport and effect following (that is to say);

"Northern and Central Bank of *England*.

"First Instalment, 1*l.* share.

"*Manchester*, 1st of *October* 1839.

"Notice is hereby given, that the first instalment, at the rate of 1*l.* per share, out of the capital stock of the above company, is now payable to the proprietors thereof, at their office in *Brown Street*, in pursuance of the resolutions passed at the extraordinary general meeting held

on *Thursday*, the 29th of *August*, for dissolving the company and dividing the assets.

"The scrip-certificate must be produced, and the payment of each instalment will be noted thereon.

"The amounts due to proprietors residing at a distance will be paid to any party applying personally for the same, on the production of the certificate and the annexed order filled up and signed by such proprietor.

"By order of the Board of Directors,

"*William Smith*, Managing Director.

"Not transferable.

"[Insert place of residence] 1839.

"To the Directors of the Northern and Central Bank of *England*.

"Gentlemen,

"You will please to honour the drafts of for the sum of , being the first instalment of 1*l.* per share on shares held by me in the above company."

The plaintiff, on the same day and year aforesaid, received of and from the defendants payment of the instalment therein mentioned; and afterwards, to wit, on the —— day of *November* in the year last aforesaid, it was arranged and agreed, between the directors of a certain other banking company in *Manchester* called the Alliance Bank, that for and in consideration of a certain annual payment to be in that behalf made by the Northern and Central Bank of *England* to the Alliance Bank, the last-mentioned company should undertake the winding up of the affairs of the said Northern and Central Bank of *England*; whereupon, and from which time, the remaining business of the said Northern and Central Bank of *England* necessary for the purpose of

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winding up the affairs thereof, was transferred to the Alliance Bank.

The Alliance Bank consisted principally of persons who had been members of the Northern and Central Bank of *England*; and it was part of the arrangement and agreement so entered into between the directors of the respective companies, that every person holding five shares in the Northern and Central Bank of *England* should, on transferring the same at the nominal price of 5*l.* each, be entitled to be admitted a holder of one share of 25*l.* in the Alliance Bank. The defendant *Smith* shortly afterwards became, and yet is, a shareholder in, and managing director of, the last-mentioned company, and, as such managing director, entitled to an annual salary, and the defendants *Hunt* and *Ogilvie* shortly afterwards became, and yet are, respectively shareholders in, and directors of, the said company, and the defendants *Haynes*, *Haigh*, and *Robins* shortly afterwards became, and yet are, respectively, shareholders in, but not directors of, the last-mentioned company. Neither *Bloor* nor *Eckersley* was or is director of, or shareholder in, the said company.

On the 30th of *December* 1839 the defendants, being such directors as aforesaid, found, and the fact was, that the cash in hand belonging to the company of the proprietors of the Northern and Central Bank of *England* then amounted to the sum of 64,925*l.*, without making any deduction for the debts then owing by the said company, and which then amounted to about 8000*l.*, and that the number of shares standing in the books of the company was 61,705; and the defendants, being such directors as aforesaid, then resolved that the sum of 1*l.* per share, being the second instalment, should be paid to the proprietors of the company on the 1st of *January* then next; and the defendants, so being such directors as aforesaid, thereupon afterwards, to wit, on

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aid 1st of *January* 1840, gave and sent to the plain-
nd to other the shareholders of and in the company,
e that the second instalment, at the rate of 1*l.* per
: out of the capital stock of the company of pro-
ors of the Northern and Central Bank of *England*,
hen payable to the proprietors thereof, at the Alli-
Bank in *Manchester*, and which notice was and
all other respects, to the same purport and effect
ie said other notice lastly above mentioned. The
tiff afterwards, to wit, on the day and year afore-
received of and from the defendants, payment of
aid second instalment of 1*l.* per share therein men-
d. On the 24th of *February* 1840, the directors,
certain meeting of the board of directors then and
: held, after taking into consideration the half-
y report, which they intended to issue to the
holders, and also the draft of a deed of indemnity,
the solicitor of the defendants had, by their direc-
prepared, did then and there resolve that the said
t and indemnity should be adopted and printed for
lation amongst the shareholders, and did also re-
and the fact was, that the cash in hand belong-
o the company then amounted to the sum of
11*l.* 0*s.* 3*d.*, and that a certain bank, called the
nix Bank, owed the company the sum of 7,800*l.*,
would be payable on the 3rd of *March* then
which sums, with a bill of one *Thomas Jackson*,
ble on the 3rd of *May* then next, for the sum o.
6*s.* 6*d.* would be sufficient to pay 10*s.* per share
1,685 shares; and thereupon the said defendants,
eing such directors, resolved that a third instalment
0*s.* per share should be paid to such of the pro-
tors as should execute the deed of indemnity therein
hereinafter mentioned. The defendants, so being
directors as aforesaid, afterwards, to wit, on the
h of *February* 1840, gave and sent to the plaintiff

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and to other the shareholders of and in the company a certain printed statement or report, which was and is to the purport or effect following; that is to say, —

"Northern and Central Bank of *England*.

"*Manchester*, 27th of *February* 1840.

"DIRECTORS.

"*William Haynes*, Chairman.

"*John Hunt*, Deputy Chairman.

"*James Pickford Bloor.*	*Alexander Ogilvie.*
"*William Eckersley.*	*Allen Robins.*
"*John Haigh.*	*William Smith.*

"The resolutions passed at the extraordinary general meeting, held on the 29th *August* 1839, for dissolving the Northern and Central Bank, and providing for the realisation and distribution of the assets, having superseded the necessity of again convening the shareholders, the board of directors have merely to make the following half-yearly report of their proceedings.

"Amongst the first steps towards bringing the affairs into smaller compass, they felt it their duty to call upon those shareholders who were indebted to the bank to pay up their balances, and in cases of default the directors proceeded (by virtue of the powers conferred by the deed of settlement) to forfeit the shares of the parties at the market price of the day, placing the proceeds towards the liquidation of their respective accounts. The number of shares has been consequently reduced from 69,757, as given in the last report, to 61,685.

"On the 1st *October* 1839 the directors declared a first instalment of 1*l.* per share out of the capital stock of the company.

"On the 31st *December* 1839 the estimated assets, after

ing the expenses of the establishment to that date, is follows:—

	£	s.	d.
ish at interest in various banks	67,901	3	11
eal estate, mortgages, bills of xchange, bank and railway hares, and other securities, alued at - - - -	80,852	0	0
utstanding balances in open ccounts, valued at - -	123,577	19	0
	272,331	2	11
rom which must be deducted, or notes still in circulation, egal expenses, and other lia- ilities of the company -	7,965	15	5
	264,365	7	6

hese valuations having been made with great care, fter further acquaintance with the circumstances of veral accounts, the shareholders will be gratified serve that the prospects held out in the report of 9th of *August* as to the ultimate result, have been ntially borne out.

)n the 1st of *January* last the directors declared a d instalment of 1*l.* per share out of the capital of the company.

n consequence of the large interest held by the Alli- Bank in the assets of the Northern and Central of *England*, the directors have thought it desirable nclude an arrangement with that establishment for ing, at a defined expense, the most efficient assist- in the liquidation of the affairs of the company. he basis of remuneration the two boards have

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assumed the minimum annual amount at which such liquidation could have been conducted as a separate establishment; and the sum of 2000*l.* has been fixed as an equivalent for the salaries of the managing director, clerks, and other servants, rent, taxes, coals, and stationery, and, in short, every other incidental expense except travelling and law charges.

"The directors are sorry to announce that they have received notice of contemplated proceedings in equity by certain parties, for the recovery of principal and premium paid on shares allotted in the latter part of 1836, on the ground, as they allege, of the subsequently ascertained condition of the bank. The directors refrain from giving an opinion as to the merits of the question in a public report; but they are satisfied that they will receive the cordial concurrence of the shareholders at large in a strenuous resistance to all such proceedings.

"The directors are happy to be enabled to declare a further instalment of 10*s.* per share out of the capital stock of the company; and while they appeal to the fact of their having within the first six months since the dissolution of the company, distributed to the shareholders what may be estimated as a moiety of the net amount to be eventually realised, as the best evidence of their anxiety to throw no obstacle in the way of a speedy termination of their trust, they feel it a duty which they owe to themselves (particularly with reference to the proceedings above noticed) to require such an indemnity from the shareholders as is contemplated by the deed of settlement, and as will suggest itself to the unbiassed judgment of all parties concerned.

"For the information of the shareholders a copy is hereto annexed of the document, to which the directors have been advised to require the signature of each individual shareholder on receipt of the present instalment.

WILLIAM HAYNES, *Chairman.*"

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A printed paper, purporting to be the draft or copy of a deed of indemnity, was annexed to the last-mentioned statement or report at the time when the same was so sent and given to the plaintiff and other the shareholders, and was therewith in fact sent to the plaintiff and other the shareholders, which printed paper was and is of the purport and to the effect following; that is to say,

"This indenture, made the 27th day of *February* 1840, between the several persons whose names and seals are subscribed and affixed to these presents, being respectively holders of the shares set opposite their respective names in the same schedule, in the joint-stock banking company established at *Manchester* in the county of *Lancaster*, called the Northern and Central Bank of *England*, of the first part, and *William Haynes*, *John Hunt*, *James Pickford Bloor*, *William Eckersley*, *John Haigh*, *Alexander Ogilvie*, *Allen Robins*, and *William Smith*, being the present directors of the said company, of the second part: Whereas on or about the 29th day of *August* 1839 the proprietors of the said bank, in due form of law, came to a resolution to dissolve the said company and wind up and close the affairs thereof, and that the net assets of the same, after discharging all the charges and obligations thereof, should be returned to, and equally divided among, the shareholders, so far as such assets would extend, in the nature of a dividend on their respective shares in the capital of the said company: And whereas the said directors, in pursuance of such resolution, proceeded to realise the assets and discharge the obligations of the said company, and out of the net assets thereof did, on or about the 1st of *October* and the 1st of *January* now last past, respectively pay unto the respective shareholders two several dividends of 1*l.* and 1*l.* upon each share: And whereas since the payment of such last-mentioned dividend the directors

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of the said company have realised further assets thereof, and have now in their hands funds sufficient, if applied for that purpose, to pay to the shareholders a further dividend of 10*s.* per share: And whereas various claims and demands have recently been made, and actions and suits at law and in equity threatened to be commenced and prosecuted against the directors, parties hereto, or against the company or the public registered officers thereof, in respect of the transactions of the said company or the said directors on behalf of the same, and the said directors are advised to retain the said funds and assets so being in their hands, for and towards their indemnity and reimbursement against and in respect of such claims, demands, actions, and suits, and the damages, costs, and expenses which may be recovered and levied or enforced from and against them and the said company by reason or means thereof; but the said directors being desirous, instead of so retaining the said funds, to apply the same, so far as they safely can, in making and paying a further dividend of 10*s.* per share to the shareholders of the said company, as before mentioned, have consented and agreed to apply the said funds in payment of such dividends to such of the shareholders as shall become parties to, and execute, these presents, and give and execute to them the said parties hereto of the second part such covenants, protection, and indemnity, as in these presents are contained: Now this indenture witnesseth, that in consideration of the premises, and more especially in consideration of the respective dividends, or sums of 10*s.* per share, paid by the said directors, at or before the execution of these presents, unto the several shareholders, parties hereto of the first part, upon or according to the number of shares of which each such party is or are a proprietor or proprietors, they the said several shareholders, parties hereto of the first part, do hereby jointly, for themselves,

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their heirs, executors, and administrators, and every two jointly, and every greater number than two respectively jointly, do for themselves, their heirs, executors, and administrators, and each and every of them, the said several persons parties hereto of the first part, doth hereby for himself and herself separately, and his or her heirs, executors, and administrators, covenant with the said several persons parties hereto of the second part, their executors and administrators, and with every of them separately, his executors and administrators, that they the said parties hereto of the first part, their heirs, executors, and administrators, or some one of them, shall and will from time to time, and at all times hereafter, well and effectually defend, save harmless, and keep indemnified, the said directors, — parties hereto of the second part, — their heirs, executors, administrators, and assigns, and each and every of them, and his heirs, executors, administrators, and assigns, and their and every of their estates and effects, and all and every other persons and person who may hereafter become directors or a director of the said company, their and his heirs, executors, and administrators, and assigns, and every of them, their and every of their estates and effects, and all the officers of the said company and every of them, and their and every of their heirs, executors, and administrators, of, from, and against all and all manner of actions, suits, attachments, and other proceedings whatsoever, either at law or in equity, which have already been, or may hereafter be, had, commenced, prosecuted, brought, or sued out, against, and all and all manner of costs, charges, losses, damages, and expenses, which may be paid, incurred, or sustained, by the said directors, parties hereto, or any of them, their or any of their heirs, executors, or administrators, or any future directors of the said banking company, or any one, two, or more of them, their or

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any one, two, or more of their heirs, executors, or administrators, or any officer of the said company, or their heirs, executors, or administrators of any such officer, for or on account or in respect or by reason of the application of the assets now in hand, or any part thereof, in or towards payment of the aforesaid dividend of 10 per share, or for, or on account, or in respect, or by reason of the past or present management, transactions, dealings, operations, acts, or deeds of or in or about or concerning the affairs, accounts, or business of the said banking company, or for or on account or in respect of any matter or thing whatsoever in anywise relating to the premises: And whereas it may frequently be necessary to transmit these presents to various places for execution by shareholders or for other purposes, and in order to guard against the consequences of loss or destruction of these presents, it has been deemed expedient that two parts thereof (duplicates of each other) should be prepared and executed, and inasmuch as many of the persons who shall execute one part of these presents may not execute the other part, it has also been thought expedient that two parts thereof (duplicates of each other) should be prepared and executed; and inasmuch as many of the persons who shall execute one part of these presents, may not execute the other part, it has also been thought expedient, in order to preserve conformity between the two, that each shareholder, a party to these presents of the first part, who shall personally execute one part of these presents, shall empower some one or more person or persons as the attorney or attorneys of him, her, or them, to sign, seal, and deliver the other part of these presents: Now, therefore, this indenture also witnesseth, that for effectuating the purposes last aforesaid, each of the shareholders, parties hereto of the first part, personally executing one part of these presents, doth hereby make,

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in, constitute, and appoint *John Farrer*, gentleman, is one of the present cashiers of the said banking pany, and *James Drew* of *Manchester*, gentleman, is one of the present clerks of the Alliance Bank, also such other person as shall for the time being e acting cashier of the said company, severally and of them separately, the lawful attorneys and attorney m or her the shareholder so executing one part of deed as aforesaid, for and in the name, and as the and deed of him or her and either jointly or seve- , to sign, seal, deliver, and execute the duplicate or nterpart of this present deed, each such constituent ectively hereby declaring that every duplicate or nterpart of this deed so executed by his or her attorney or attorneys as aforesaid shall be of the force and effect as if executed by him or her, each h constituent hereby agreeing to ratify and confirm and whatsoever such attorney or attorneys shall law- lly do in the premises by virtue of this present power. witness, &c."

The above written indenture was signed, sealed, and elivered, on parchment duly stamped, by the several ersons parties thereto, in the presence of the several ersons whose names are respectively written on the exter side of the respective signatures of the parties so xecuting.

The schedule to the above written indenture: —

Name of each Proprietor.	Number of each Proprietor's Share.	Signature of Proprietors.	L. s.	Witnesses' Signature.

The defendants, so being such directors as aforesaid, at the time of so sending and giving to the plaintiff and

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other the shareholders, such statement or report a such printed paper annexed thereto as aforesaid, d also annex to the said statement or report a certa notice which was and is to the purport following, that to say: —

"Northern and Central Bank of *England*,

"Third Instalment, 10*s*. per share.

"*Manchester*, 27th *February*, 184

"Notice is hereby given that a third instalment, bein at the rate of 10*s*. per share out of the capital stock o the above company, is now payable to the proprieto thereof at the Alliance Bank, at &c., in pursuance o the resolutions passed at the extraordinary gener meeting held on *Thursday* the 29th of *August*, 1839, fo dissolving the company and dividing the assets.

"The scrip certificate must be produced, and th pavment of the instalment will be noted thereon. I consequence of the necessity which exists for requirin the signature of each proprietor to the deed of inden nity previous to receiving the instalment, the directo are obliged in the present instance to omit the ord which has hitherto been annexed for the convenience distant shareholders, but it is intended to transmit th deed together with the instalment to the several tow where any number of shareholders reside, and of whi due notice will be given.

"By order of the Board of Directors."

The affairs of the company before and at the time the said dissolution thereof were and thence continual had been greatly involved and embarrassed, and th company, and the defendants as such directors as afor said, for and on behalf of the company, respective entered into divers covenants and agreements, and ha

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reby subjected themselves to divers liabilities to a ch greater amount in the whole than the amount of the assets of the company by them the defendants r realised, and which liabilities at the time of giving l sending the said statement or report, bearing date 27th of *February*, 1840, were and continued and nce had continued and still were outstanding and uncharged, and legal proceedings had shortly before time of giving and sending the last-mentioned notice statement, been threatened to be commenced against company and the defendants as such directors as resaid in respect thereof; and thereupon the defendts had just before the giving and sending the last-mened statement or report determined not to make or y the said third instalment or dividend, to wit, of 10s. er share, unless the shareholders of and in the comany would execute a deed of indemnity to such purport r effect as the printed paper so annexed to the said statement or report, and had thereupon caused such deed of indemnity thereinbefore-mentioned,—and which was to such purport and effect as the said printed paper,—to be, and the same was, accordingly prepared and ingrossed, and was, to wit, on the day and year last aforesaid, and thenceforth had been, ready to be executed by the said several shareholders, and was, in fact, thereupon in due manner executed by divers of the shareholders of and in the company, and the last-mentioned instalment or sum of 10*s.* per share was in due manner paid by the defendants to such of the shareholders as executed the deed of indemnity, and the defendants were, on and from the day and year last aforesaid, ready and willing to pay the same to all and every other the shareholders of and in the said company upon their executing such deed of indemnity; of all which premises the plaintiff during all the time aforesaid had notice. The plaintiff so being such shareholder as aforesaid, after the giving and send-

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ing to him of the said statement or report, bearing date the day and year last aforesaid, together with the said printed paper and notice thereunto annexed as aforesaid, to wit, on the 16th of *November* 1840, caused a certain paper writing, signed with his hand, to be delivered to the defendant *William Smith*, which said paper writing was and is to the purport and effect following; that is to say,

"To *William Smith*, Esquire, the managing director, and to the other directors of the Northern and Central Bank of England: I hereby demand payment from you of the two instalments of 10*s.* each, upon the shares held by me in the above bank, which instalments you have admitted to be ready for each shareholder, but which you refuse to pay to me unless I execute a certain deed of indemnity required by you; which I decline to do, being advised that I am improperly required to sign it. And I hereby give you notice, that I am prepared and ready to give you a valid discharge for the amount of the said instalments, and that I shall require interest to be paid on the amount thereof for the time the same have been illegally withheld, and that interest will also be required by me from the date of this demand."

The plaintiff hath always hitherto refused to execute the deed of indemnity, and the defendants, so being such directors as aforesaid, have always hitherto refused to permit the last-mentioned instalment or sum of 10*s.* per share mentioned in the said statement and notice, bearing date the 27th of *February* 1840, to be paid to the plaintiff, or to other the shareholders, until he and they should respectively execute the said deed.

The special verdict concluded in the usual form, with the finding of the jury upon each issue subject to the opinion of the court.

The case was argued in *Michaelmas* term last by *Bompas* Serjt. (with whom was *Starkie* and *Crompton*) for

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ff, and by Sir *T. Wilde* Serjt. (with whom *nell* Serjt. and *John Henderson*) for the de-
ut it has not been thought necessary to report
ments, as they are fully adverted to in the
pronounced by the court.

Cur. adv. vult.

C. J., now delivered the judgment of the court.
an action of assumpsit, brought by *Matthew*
nst *William Haynes* and seven other defend-
e first count of the declaration, in substance,
it the plaintiff and defendants and others had,
ears, carried on the business of bankers under
ions of the statute 7 *G.* 4. *c.* 46. by the name
orthern and Central Bank of *England*, and
aintiff was the holder of 100 shares in the
he said bank, of 10*l.* each; that shortly before
g of the promise thereinafter mentioned, the
ompany and the business thereof were duly
and altogether ceased and determined; that
ants were shareholders and directors of the
and that at a general meeting of the share-
: the time of the dissolution, it was agreed by
gst the shareholders that the assets of the said
ompany should be realised with all convenient
l that such portion of them as might not be
o meet the engagements of the said bank or
should be divided amongst the said share-
itably and in proportion to the shares re-
held by them in such dividends as the
night from time to time deem fit, a dividend
ared at least once in every six months. The
n then proceeded to allege that thereupon and
ration that the defendants were allowed and
to realise, and were then intrusted with, the
the company by the other shareholders, *for*

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reward to them the defendants in that behalf, they the defendants promised the several shareholders to realise the said assets with all convenient speed, and to divide such portion of them as might not be required to meet the engagements of the company, amongst the shareholders rateably and in proportion to the shares respectively held by them in such dividends, as they the defendants might from time to time deem fit, a dividend to be declared at least once in every six months. The declaration then proceeded to aver that although the defendants were allowed to realise, and were intrusted with, the assets of the company, and although they did realise a large sum of money, of which a large portion was not required or necessary to meet the engagements of the said bank or company, and which portion was sufficient when divided amongst the shareholders to allow to each shareholder a dividend of 10*s.* for each share, and although the defendants did deem fit that such dividend of 10*s.* for each share should be paid to each shareholder, and although they were requested by the plaintiff to pay him the dividend on the shares so held by him, yet that the defendants would not declare or pay to the plaintiff the said dividend or any part thereof. The declaration then proceeded to assign a second breach of the defendant's promise by alleging that although the defendants were so allowed to realise, and were intrusted with, the assets of the company, and although they did, after the expiration of the two first six months from the agreement and promise, realise a large amount, of which a large portion was not required or necessary to meet the engagements of the said bank, and which was sufficient when divided among the shareholders to allow to each shareholder a dividend of 10*s.* for each share, and although the defendants in part performance of their promise did within the two first six months after the said meeting and promise deem fit

to declare, and did declare two dividends according to their promise, yet they did not within the third space of six months or at any other time afterwards, although the time had long elapsed before the commencement of the suit, deem fit to declare, or declare any dividend in respect of the said shares whereby the plaintiff had lost the dividend of 10*s.* for every share so held by him as aforesaid. The declaration also contained counts for money had and received, and on an account stated.

The defendants pleaded—first, to the whole declaration *non assumpserunt;* secondly, to the first count, that the plaintiff was not the lawful owner of shares, as alleged; thirdly, also to the first count, that the bank or company and the business or trade thereof, had not been nor was duly dissolved, nor had the said bank or company, and the business or trade thereof, ceased or determined, nor did the same cease and determine, *modo et formâ;* fourthly, also, to the first count, that it was not agreed by and amongst the shareholders, *modo et formâ*, &c.; fifthly, also to the first count, that the defendants were not allowed to realise, nor were they intrusted with, the assets of the company, *modo et formâ*, &c.; sixthly, to the first breach of the first count, that the defendants did not realise the amount in that count mentioned; seventhly, also to the first breach of the first count, that the portion of the amount so realised, as in that count mentioned, was required and necessary to meet the said engagements of the said bank or company, and that there never was any portion of the said amount, not being so required or necessary, which was sufficient when divided, as in the first count mentioned, to allow each shareholder such dividend as in the first count mentioned; eighthly, also, to the first breach of the first count, that the defendants did not deem fit that such dividend should be paid and divided amongst the shareholders, *modo et formâ;* ninthly, also, to the same

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first breach, that the defendants had no notice of the several premises, *modo et formâ;* tenthly, also to the same first breach, that the defendants did declare and pay to the said plaintiff the said dividend; eleventhly, to the second breach in the first count, that the defendants did not realise the amount in the breach mentioned, *modo et formâ;* twelfthly, also to the second breach, a plea like that secondly pleaded to the first breach; thirteenthly, also to the second breach, that the defendants had no notice, *modo et formâ;* fourteenthly, also to the second breach, that the defendants did within the said third space of six months, deem fit to declare, and did declare, a dividend of 10*s.* in respect of the shares in the bank; fifteenthly, to the last two counts of the declaration, payment in full satisfaction and discharge, &c.

The plaintiff by his replication traversed the allegation in the last plea, upon which issue was joined, and joined issue on all the other pleas.

Upon the trial a special verdict was found by the jury; and we have been called upon to decide how the finding upon the several issues is to be entered.

Upon the argument it was contended on the part of the plaintiff that, upon the facts found by the special verdict, he was entitled to have the verdict on all the issues entered for him. On the part of the defendant it was admitted that the plaintiff was entitled to have the verdict entered for him on the second and sixth, tenth and eleventh and fifteenth issues; but it was contended that the rest, either in part or altogether, ought to be entered for the defendants. In order to determine this case, therefore, it will be necessary to consider the several disputed issues in connection with the facts applicable to each as found by the special verdict; but as the decision upon the first issue must depend upon the result of the argument upon some of the other issues, it

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ender the explanation of our judgment more dis-
if we postpone the consideration of the first issue
esent.

der this arrangement the third issue will be the
in order for discussion, and that is, whether the
or company had been duly dissolved, and the busi-
or trade thereof had altogether ceased and deter-
l. Upon reference to the special verdict, it appears
he company had, for some years prior to and up to
pon the 29th of *August* 1839, carried on the trade
business of bankers under the provisions of the
4. *c.* 46. upon the terms and conditions contained
o deeds of settlement, dated respectively the 1st of
1834, and 30th of *August* 1836, and after setting
hose provisions of the first deed of settlement,
ein are contained the circumstances under which,
he manner in which, the bank and company might
ssolved at an extraordinary general meeting of the
holders called for that purpose by the *Manchester*
l of directors, the special verdict proceeds to state
tail the calling of an extraordinary general meeting
e *Manchester* directors, pursuant to these provisions
e deed of settlement; the meeting of the share-
rs on the 29th of *August*, in pursuance of such
circumstances which, according to the provisions
e deed, authorised the shareholders present at the
ing to dissolve the company; and the adoption at
meeting of those steps which were prescribed by
leed of settlement, as the means of effecting the dis-
ion; and afterwards, in terms, finds that it was at
meeting resolved by the several persons present—
that in conformity with the said requisition of the
John Hazledine, the said company was thereby dis-
d; secondly, that the winding up of the affairs of
ompany should be intrusted to the then present
l of directors, with power to them to employ and

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pay for such assistance as might be necessary for that purpose, and that any three of them should be empowered to act as a quorum; thirdly, that the assets of the company should be realised with all convenient speed, and that such portion of them as might not be required to meet the engagements of the company, should be divided amongst the shareholders, ratably and in proportion to the shares respectively held by them, in such dividends as the directors might, from time to time, deem fit; a dividend to be declared at least once in every six months: fourthly, that a copy of the said proceedings and resolutions at the said extraordinary general meeting should be transmitted to each shareholder, and that thenceforth no transfer of shares to parties not already shareholders should be permitted. The special verdict then proceeds to state, that no number whatever of proprietors personally present at the said meeting, was desirous of continuing and carrying on the said concern, or did in writing undertake so to do; that a copy of the said proceedings and resolutions, as well of the general half-yearly meeting as of the extraordinary general meeting, was, in due manner, transmitted to the plaintiff and other the shareholders of the company, and that the said trade or business so theretofore carried on as aforesaid by the said company, on and from the said 29th of *August* 1839, was and thence hitherto had been wholly discontinued, save and except so far as was absolutely necessary for the winding up of the affairs of the said company; and that the defendants, so being such directors as aforesaid, thereupon, in pursuance and by virtue of the said resolutions at the extraordinary general meeting as aforesaid, did proceed to the winding up of the affairs of the said company.

Upon the argument it was contended on the part of the defendants, that although by the resolutions passed at the extraordinary general meeting, it was resolved

company should be dissolved, yet as the winding
ıe affairs of the company had been intrusted to
ndants as the directors of the company, and as
purpose it would be necessary, partially at least,
nue the business, and as the jury had qualified
ding that the trade and business of the company
n discontinued, the allegation in the declaration
business and trade of the company had alto-
eased and determined was not made out, and
e that the third issue ought to be found for the
nts.

we are of opinion that the company was duly
d according to the provisions of the deed of
nt, and that it had altogether ceased and deter-
ccording to the meaning of the allegation in the
ion; for we think that averment must be taken
that the plaintiffs and defendants, and the other
lders, had ceased to carry on the business as
. The object of that averment was obviously to
e way for the statement of the agreement and
that follow, which could have afforded the
no ground for an action at law if the partnership
ntinued. Now although for the purpose of
good their engagements with third persons, the
hip in this, as in all other cases, must subsist,
standing a formal dissolution, yet it subsists for
r purpose; and the object of the resolution was,
in the hands of a few the powers necessary for
the assets, and discharging the engagements, of
ner partnership, which otherwise the share-
as tenants in common of the partnership secu-
ust have exercised for themselves. Whether
wers were legally conferred by that resolution,
part of the inquiry on the issue now under
ation. We therefore are of opinion that the
ue must be found for the plaintiff.

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was made by and between the shareholders
the time of dissolution; and, secondly, that tl
tion must be taken to aver that it was agre
time by and amongst *all* the shareholders; v
the finding of the jury it nowhere appears tl
shareholders were present, or that those who
sent had authority to bind the absentees; b
contrary it is expressly found that neither t
nor the defendant *Haigh*, who were both sh
were present on that occasion, and there is nc
that they had authorised any one to make
agreement for them. On the part of the plai
answered that the subsequent conduct of tl
and the defendant *Haigh*, as found by the ju
be sufficient to shew either a previous autho
or, what would amount to the same thing, a
by them of the agreement afterwards, withou
into the question whether the facts stated in
verdict would be sufficient to warrant the
contended for.

It is enough to say that the conclusion is n
clusion at law, but a conclusion of fact, whic
have not drawn, and which the court canno
them. The partnership having been diss
members present could have no legal authori
the absent shareholders unless it had been

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›resent. The next question then will be, Does the nent in the declaration assert that the agreement between all the shareholders? and we think it be so read. It is first alleged that the plaintiff a shareholder, then that the defendants (of course ıding *Haigh*) were at the time of the dissolution eholders and directors; it then states that a general ting of the several persons, shareholders in the said ital of the said bank or company, and members eof, at the time of the dissolution, was held and took e; and at the said meeting it was agreed by and ngst the said shareholders and members as stated in resolutions already referred to. Looking therefore he language of the averment, and to the purpose for ch it is avowedly introduced, namely, as the basis consideration of the promise upon which this action ought, we cannot understand it in any other sense as an averment of an agreement between all the eholders, including especially the plaintiff and all defendants; and being so understood, it is expressly tived by the finding of the jury, that neither the tiff nor the defendant *Haigh* were present at the ing.

ut we also think that if the special verdict had ssly found that the plaintiff and all the defendants present at the meeting, the facts stated would not that any contract had been entered into between at that meeting. It is true that the declaration avers that it was agreed; and that in some sense at it is clear that the parties present did agree to the ms of the resolution. But we think that the declaion must be read as averring a contract between the rties; because in no other way would it form any conderation for the promise upon which the action is ought; and reading the averment in this sense, we ink it is not made out by the facts stated. But as

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this branch of the question will be more fully consider[ed] when we give our opinion on the first issue, it is enou[gh] for the present to declare our opinion that upon t[he] grounds already stated, the verdict on the fourth iss[ue] should be entered for the defendants.

The fifth issue we think must also be found for t[he] defendants; for though it is found by the special verdi[ct] that in pursuance of the resolutions at the extraordina[ry] general meeting, the defendants proceeded to wind [up] the affairs of the company, and were, by the other sha[re]holders and members of the company, permitted [to] proceed in realising the assets of the company with [all] convenient speed, and although, as admitted at the b[ar], the finding upon the sixth issue must, upon this verdi[ct], be entered for the plaintiff, yet as the averment tra[n]versed by the fifth plea alleges that the defendan[ts] were permitted to realise the assets for *reward* to the[m] the defendants in that behalf, and as there is nothi[ng] in the special verdict to support the material allegatio[n] of the reward, which suggests a consideration for th[e] promise that follows, we are of opinion that this ave[r]ment in the declaration is not proved, and that th[e] finding upon the fifth as well as upon the sixth issu[e] must be entered for the defendants.

Having thus disposed of all the issues that form th[e] basis and consideration for the promise upon which th[e] action is founded, we will now proceed to examine th[e] issue raised by the first plea upon the promise itsel[f]. And first it must be observed that the special verdi[ct] finds no express promise by the defendants, otherwis[e] than as it may be contained in the resolutions passed [at] the extraordinary general meeting; and as we hav[e] already decided that those resolutions, *per se*, contain[ed] no binding contract between the plaintiff and the de[-]fendants, because the plaintiff and one of the defendants were absent at the time they were passed, and because

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is no finding of the fact that they or either of them y previous authority or subsequent adoption, made elves parties to any agreement then made by the olders present, it might be enough to say that as essary consequence the first issue, so far as it to the first count, must also be found for the ants. But we also intimated our opinion that easons more obviously connected with the first the resolutions relied on contained no contract which any right of action at law could be founded s between the defendants and the other share- s present at the meeting. We will state our s for so thinking.

leciding this point it is necessary to consider the n of the parties at the time of the meeting, — the e of that meeting,—and the object to be effected resolutions. The object of the meeting was, to end to the partnership; and the company was ingly dissolved; the authority of the directors to he other shareholders was thereby put an end to, became necessary, therefore, to make arrange- for realising the assets, and discharging the ies of the company, and dividing the surplus. out such an arrangement, any one of the share- s might receive payment of the debts due to the ny, and each shareholder would have to concur indorsing and disposing of the securities of the ny, and in settling the engagements into which ad entered during their partnership. The course d was the most prudent and natural, — to place nagement and winding up of the concerns of the ny in the hands of a few members, best able to tand, and wind up, its concerns. By so doing the olders gave up no advantage, and conferred no upon the defendants. And there is nothing stated face of this special verdict to shew that in un-

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dertaking this onerous duty, the defendants intended to bind themselves by any contract, to declare and pay out of the assets realised, the dividends according to the terms of the resolutions. They undertook a burdensome trust; and having undertaken the trust it would be their duty, after collecting the assets and paying off the debts and liabilities of the company, to divide the surplus ratably amongst the shareholders. But it was a duty unconnected with any profit, and in discharge of which the defendants were, by the very terms of the resolution, to exercise their discretion. In the case of *Owston* v. *Ogle*(*a*), relied upon by the plaintiff's counsel, there was an express and several agreement in writing by the defendant with each part-owner, to make out an account and divide the net profits upon the ship's return. Each part-owner therefore was, by the express agreement of the defendant, entitled to an account whatever might be the result of the voyage. In this case the dividends were to depend upon the judgment of the defendants, who have nowhere stipulated with the several shareholders to render them an account, so as to subject themselves to an action at law at the suit of each for not accounting or declaring a dividend according to the terms of the resolution.

Upon a view of the facts found upon this verdict, we consider the defendants as bare trustees for the shareholders, liable to account to them *in equity* for the execution of their trust, but not as binding themselves by any such contract as that stated in the first count of the declaration.

The first plea, however, also puts in issue the promises stated in the last two counts; and this makes it necessary to see whether there are any facts stated in the special verdict, that make out any subsequent con-

(*a*) 13 *East*, 538.

tract by the defendants with the plaintiff to pay him any money had and received by them to his use, or due to him upon any account stated. On the part of the plaintiff it was contended that as it appeared by the special verdict that the defendants had in their hands a sum of money sufficient to pay every shareholder a dividend of 10*s.* per share, and that they had actually declared a dividend to that amount, the plaintiff became entitled to the dividend on his shares to the amount of 50*l.*, and that the law would imply a promise on the part of the defendants to pay him that sum, which they had, on their own admission, in their hands, for his use; and the case of *Brown* v. *Bullen* (*a*) was relied on as an authority. That was the case of a creditor suing the assignees under a commission of bankrupt, for the amount of a dividend declared by the commissioners. In that case therefore the assignees had no discretion to exercise; but after the declaration of the dividend by the commissioners they held the money under the assignment, simply for the purpose of paying it over to the creditors in proportion to their several debts. To bring this case therefore within the principle of that decision, the plaintiff must shew that the defendants had declared themselves possessed of the several dividends ready to be paid over unconditionally to the several shareholders applying for them. But upon reference to the special verdict it appears that the very instrument by which the dividend is declared, commences, with a statement of certain claims that had been made on the funds of the company and of threats of proceedings in equity which the defendants (though they declare a further dividend of 10*s.* per share) urge as an excuse for making such dividend payable only to such of the shareholders as should execute a deed of indem-

(*a*) 1 *Dougl.* 407 a.

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nity, the form of which was annexed. If therefore th[illegible] defendants' legal liability to pay the plaintiff his divide[illegible] is to rest on a promise implied from the above d[illegible] claration of it (and we have already decided that [illegible] other has been found), it would at the most amount [illegible] a promise to pay the plaintiff as soon as he should ha[illegible] executed the required indemnity. On the part of t[illegible] plaintiff it was urged, that the defendants had no rig[illegible] to require an indemnity to the extent stipulated for [illegible] them as the condition for the payment of this dividen[illegible]; but the question we are now considering is, not whether in the due execution of their duty they ought to ha[illegible] declared and paid a dividend unincumbered by the co[illegible] ditions imposed (which might be a fit subject of inqui[illegible] in a court of equity), but whether they had in fact de[illegible] clared a dividend payable unconditionally so as to ma[illegible] the amount of the plaintiff's proportion recoverable [illegible] *law* as money had and received to his use.

We think that the instruments as set out on the spe[illegible] cial verdict shew a conditional undertaking only. An[illegible] as it also appears that the condition required has no[illegible] been complied with by the plaintiff, we are of opinio[illegible] that he is not entitled to recover on either of the la[illegible] two counts, and therefore that the first issue must b[illegible] found entirely for the defendants.

This view of the subject renders the finding upo[illegible] the remaining issues of little importance. It is nece[illegible] sary, however, to direct how they should be entered u[illegible] with a view to the costs upon each issue. The issue[illegible] raised upon the seventh plea to the first breach, an[illegible] upon the twelfth to the second breach, are, whether there was in the hands of the defendants any portion of the amount realised not being required necessary to meet the engagements of the company which was sufficient, when divided as in the first count mentioned, to allow to each shareholder the instalment dividend of

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:r share. Upon these issues the burthen of proof ›on the plaintiff, although very slight evidence be sufficient to shift it upon the defendants, who ›e taken to know best the amount of the assets, e liabilities of the company. Upon reference to ecial verdict, we find it stated that at the time of solution of the company, the affairs of the com- vere, and thence continually had been, greatly in- and embarrassed, and that the company, and the ants as directors on behalf of the company, l into divers covenants and agreements, and had y subjected themselves to liabilities to a much r amount in the whole than the amount of all the of the company by them, the defendants, ever d. Upon this finding we think the seventh and ı issues must be entered for the defendants.

: question on the eighth issue is, whether the de- ıts did deem fit that an instalment or dividend of er share should be paid and divided amongst the ıolders. The burthen of proving this issue was n the plaintiff. But on referring to the special t, we find, as already noticed, that the defendants, gh they declared a dividend of 10*s.* per share as le to such of the shareholders as should execute ıdemnity, expressly limited the payment of it to of the shareholders as should execute the proposed ınity, and we nowhere find any declaration that leemed fit that such dividend should be paid in the al and unqualified manner alleged by the declar-

The finding upon this issue, therefore, should ›e entered for the defendants.

e issue on the fourteenth plea, which is pleaded to :cond breach, is in some respects like the eighth, ras treated on the argument as the converse of that ıted on the eighth, and as necessarily depending the decision of the eighth; but there is this dif-

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ference between them, viz., that the allegation in the declaration put in issue by the fourteenth plea, is, not that the defendants did not deem fit that the dividend should be *paid*, but that they did not deem fit to *declare*, and did not *declare* a dividend, though they had assets sufficient in their hands. Now, the special verdict in terms finds that the defendants *did* declare a dividend, though they made the payment of it contingent upon the execution of the indemnity. We therefore think that the issue should be also entered as found for the defendants.

The question on the ninth and thirteenth issues, is whether the defendants had notice of the several facts on which notice to them is alleged in the declaration. Of those facts which the special verdict does not find alleged, the defendants could have had no notice, and therefore as to them the issue will be entered for the defendants. Of those which the finding of the jury shews to have existed to the knowledge of the defendants, the defendants had notice, and as to them these issues will be found for the plaintiffs. It is unnecessary that these should be set out in detail; the parties will have no difficulty, from what we have said on the several other issues, to distribute this finding according to their rights.

There only then remains the fifteenth issue taken on the plea of payment, which, by assent of both parties, is to be entered as found for the plaintiff.

The result of our judgment will therefore be, that the second, third, sixth, tenth, eleventh, and fifteenth issues will be found for the plaintiff; the first, fourth, fifth, seventh, eighth, twelfth, and fourteenth will be found for the defendants; and the ninth and thirteenth will be found partly for the plaintiff, partly for the defendants, in the manner already stated, and the judgment upon the whole record will be for the defendants.

Judgment for the defendants.

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RAPHAEL *v.* PICKFORD and Another. *Feb.* 8.

The declaration stated that on the 1st of *ist*, 1842, the defendants were common carriers for hire from *London* to *Birmingham*, in the f *Warwick*, and the plaintiff then delivered to dants as such carriers, and the defendants then from the plaintiff, divers goods, to wit, 20,000 ,000 pens, one box, one case, and one bag of iff of great value, to wit, of the value of 20*l.*, ried for hire by the defendants as such com- iers from *London* to *Birmingham* aforesaid, , to wit, at *Birmingham* aforesaid, to be deli- the defendants for the plaintiff for reasonable reward to the defendants in that behalf, and it me the defendants' duty (*a*) safely and securely and convey and deliver the said goods as

Averment, that a reasonable time for the s' carrying and conveying and delivering the ls as aforesaid elapsed before the commence- he suit breach: that the defendants, neglecting duty in that behalf, did not safely or securely convey the said goods from *London* to *Bir-* aforesaid, or at *Birmingham* aforesaid safely or leliver the same for the plaintiff, but then so y and improperly behaved and conducted s, that, by and through the negligence, care- nd default of the defendants in the premises, goods, then and before the commencement of became and were and are wholly lost to the

In case against a carrier, where the duty is alleged to be, safely to carry and deliver, the grievance may be stated to be non-delivery within a *reasonable* time.

And where the declaration alleged a contract to carry for hire, and stated the defendants' duty to be to carry safely and deliver, and the breach assigned was that a reasonable time for the delivery had elapsed, but that the defendants had not delivered the goods: it was held, that the plaintiff was entitled to recover upon proof of non-delivery within a reasonable time.

re, whether the of the duty might en omitted, the court being bound to know and state to the jury what were the duties resulting from the contract set out.

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plaintiff; and, by reason of the premises, the plaintiff was before the commencement of the suit necessarily detained in *Birmingham* aforesaid, and obliged to waste and consume his time, to wit, eight days from the day and year aforesaid, in and about attempting to procure the delivery to him of the said goods; and he thereby also lost great profits, to wit, profits to the amount of 5*l*., which he would have derived from the delivery of the said goods, if they had arrived in *Birmingham* aforesaid, to divers persons to whom the plaintiff had sold the same, &c.

Pleas, first, not guilty; secondly, that the plaintiff did not deliver to the defendants, nor did the defendants receive from the plaintiff, the goods in the declaration mentioned, to be carried and delivered for the plaintiff by the defendants, *modo et formâ*; concluding to the country. Issue thereon.

At the trial before *Tindal* C. J. at the adjourned sittings in *London*, after *Michaelmas* term, the following facts appeared:—

In *July*, 1842, the plaintiff being at *Birmingham*, and having there entered into a contract for the sale, to one *Myers*, of a quantity of quills and pens, sent an order for them to a pen-manufacturer in *London*. A parcel containing the pens ordered was accordingly addressed to the plaintiff at the *Green Man, Edgbaston Street, Birmingham*, and was delivered at the office of the defendants, who were common carriers, on the 8th of *August*, 1842. The parcel not arriving in due course, the plaintiff and another person went on the 10th to the defendants' office in *Birmingham*, and were told it had not arrived. The plaintiff called a second time, and received the same answer. Upon a subsequent application to the defendants in *London*, the plaintiff was told that the parcel should be sent. It was at length sent, but not until the 3d or 4th of *September*, which was too late

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for the performance of the plaintiff's contract with *Myers*. The delay was caused by the direction having been accidentally destroyed.

The defendants' counsel applied for a nonsuit, on the ground that, the plaintiff had merely alleged that it was the duty of the defendants to deliver safely, and not to deliver within a reasonable time, and that he had assigned a breach in not delivering at all.

His lordship declined to nonsuit the plaintiff, and left it to the jury to say, whether the parcel had or had not been delivered according to its direction, within a reasonable time, reserving to the defendants (should it become necessary) leave to move to enter a nonsuit. The jury returned a verdict for the plaintiff, damages, 40*s*.

In *Michaelmas* term last, *Bompas* Serjt. obtained a rule nisi for entering a nonsuit.

Talfourd Serjt. (with whom was *Montague Chambers*), in *Hilary* term last shewed cause. It was correctly held at the trial, that the plaintiff was not at liberty to give evidence of special damage, because the declaration had not named any party to whom the quills were sold. But it appeared that the defendants had been guilty of a clear breach of the duty stated in the declaration, in not delivering the goods, although repeated applications had been made for them by the plaintiff at the defendants' office. [*Cresswell* J. The goods were delivered before action brought.] The duty, as stated in the declaration, must be taken to import a liability to forward the goods forthwith, that is, by the first conveyance. It was not necessary, nor would it have been proper, to allege that the duty was, to deliver within a reasonable time. [*Tindal* C. J. Sufficient time must be allowed for the conveyance and delivery. *Cresswell* J. If the right of action accrued

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it has not been destroyed by any thing which has occurred since. If the grievance charged in the declaration had been confined to the *loss* of the parcel, that grievance would have been answered by the *delivery* of the parcel.] The allegation of loss is not to be understood as the allegation of an *irretrievable* loss. The allegation is, that the goods *were* and *are* wholly lost. But a plaintiff in tort is not bound to prove a grievance to the full extent of the allegation. *Bonafous* v. *Walker* (*a*), *Gardiner* v. *Croasdale* (*b*), *Davis* v. *Chapman.* (*c*)

Bompas Serjt., in support of the rule. The parcel was directed to be taken to *Myers.* The parcel was taken to *Myers*, who was the agent of the plaintiff for the purpose of receiving the parcel. *Myers* accepted the goods, and the plaintiff had the benefit of that acceptance. If the declaration had averred the duty to be to carry within a reasonable time, and had alleged, that, by reason of the non-delivery within a reasonable time, the goods had been wholly lost, it would have been difficult to contend that the plaintiff was not entitled to retain his verdict. Before the new rules of pleading, it was usual to insert a second count for not delivering within a reasonable time; which shews that the general count was not considered sufficient. *Golden* v. *Manning.* (*d*) Now the plaintiff must make his election. [*Cresswell* J. The question between the parties is, what is the meaning of the issue;—whether it involves a liability to deliver within a reasonable time. *Tindal* C. J. Are not the words "within a reasonable time" to be introduced on the part of the defendant, and for his protection.] If it had been pleaded that they did deliver before the commence-

(*a*) 2 *T. R.* 126.
(*b*) 2 *Burr.* 904.
(*c*) *Antè*, Vol. II. 921.; 3 *Scott, N. R.* 238.; 9 *Dowl. P. C.* 645.
(*d*) 3 *Wils.* 429.

f the action, the defendants must have succeeded
at issue. (*a*) If the plaintiff had replied a non-
r within a reasonable time, it would have been a
re. (*b*) According to the construction contended
declaration would mix up two grounds of com-
which were totally distinct, namely, that the goods
jured or were not delivered at all, or that they
t delivered within a reasonable time. [*Erskine* J.
the declaration have been good, if it had con-
o allegation that a reasonable time for deliver-
goods had elapsed? *Coltman* J. Suppose the
to be robbed, and that he afterwards recovered
perty, would that satisfy an allegation that the
ere safely and securely carried and conveyed?]
mitted that it would. In *Rucker* v. *Palsgrave* (*c*)
eld, that the payment of money into court upon
for a total loss, on a valued policy, is no admis-
t the loss is total. The case of *Davis* v. *Chap-*
ferred to on the other side, is to the same

AL C. J. We should like to look at some of
r precedents.

Cur. adv. vult.

AL C. J. now delivered the judgment of the

stating the pleadings, his lordship proceeded
Upon the trial it appeared that a parcel con-
quills had been delivered to the defendants
8th of *August* 1842, addressed to the plaintiff

ut the plaintiff might
urred to a plea which
swered the allegation
delivery within a rea-
ime.

(*b*) *Com. Dig.* tit. *Pleader*, F. 7—11. *Antè*, 729 (*b*).

(*c*) 1 *Campbell*, 557.; 1 *Taunt.* 419.

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at *Birmingham*, and that it had in fact been delivered for the plaintiff according to the direction, before the commencement of the action, but not till the 3rd or 4th of *September*, when it was too late for the plaintiff to use the quills for the purpose for which they had been purchased by him; whereas, according to the ordinary course of carriage, they should have been delivered on the 10th of *August*. On this evidence the plaintiff claimed a verdict for damages for the nondelivery within a reasonable time; but the defendant's counsel objected that such damages could not be recovered under this form of declaration, and that, as the plaintiff had neither alleged a duty to deliver within a reasonable time, nor a failure to deliver within a reasonable time, but merely a duty safely and securely to carry and deliver generally, and a breach in not delivering at all, the plaintiff had not made out his case, and ought therefore to be nonsuited. I reserved the point, giving my brother *Bompas* leave to move to enter a nonsuit, and left to the jury the question whether the parcel had been delivered within a reasonable time. The jury found a verdict for the plaintiff, damages 40*s*.

In the beginning of last term my brother *Bompas* obtained a rule nisi for a nonsuit upon the point reserved, and the question was argued on the 24th of *January* last. For the defendants it was contended that the declaration ought to have alleged that the parcel was received by them to be safely and securely carried and delivered to the plaintiff *within a reasonable time*, and also have averred, either the promise, or the duty, of the defendants so to carry and deliver the parcel, and then to have stated, as a breach, that the defendants had not delivered the parcel within a reasonable time; and we were referred to the case of *Golden* v. *Mar-*

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), where the declaration contained three counts, t like that under discussion, the second in the hich my brother *Bompas* contended, as I have stated, this declaration ought to have followed, hird alleging a promise to deliver in a reasonable nd a breach like the breach in the present de- n; and it was said that before the new rules for g, counts for not delivering within a reasonable ere usually added to the general count; but no ty was cited to shew that this was *necessary;* and nothing in the case in 3 *Wilson,* either by way iment from the bar, or dictum from the Bench, he subject; and if the practice before the new ere to be taken as affording a safe guide as to the ty of such a count, it would lead to the con- that a plaintiff could not recover, upon a common *tus* count for goods sold and delivered, the value ds, or upon the general count for work and where no price had been agreed upon, because, ier days, the pleaders always added counts upon *ntum valebant* and *quantum meruit.*

he absence of all authority, therefore, we must e the argument as presented to us; and, in so we must keep in mind that we are not discussing tion of pleading upon a special demurrer, but ascertaining whether the allegations in the de- n are supported by the evidence: And we will r, first, the allegation of the defendants' duty, condly, the allegation of the breach.

as not denied that, if the action had been brought total loss of the parcel, and the evidence had that it had *never* been delivered, the plaintiff have been entitled to recover upon the declaration framed; and, if so, then it necessarily follows

(*a*) 3 *Wilson,* 429.

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that the evidence given as to the contract and duty of the defendants would prove the *duty* as laid. Neither could it be denied that if it had been alleged to be the defendants' duty to deliver within a reasonable time, the same evidence would have been sufficient to support that allegation, the duty to deliver within a reasonable time being merely a term engrafted by legal implication upon a promise or duty to deliver generally. No valid objection, therefore, exists to the proof of the duty as alleged. Whether such allegation would have been good upon special demurrer, if the only breach had been the non-delivery within a reasonable time, is another question, not material to our present inquiry.

But it is said no such breach is alleged in this declaration, and yet that is the only breach supported by the evidence. But we think that the breach in this declaration may be read as, in effect, stating that the defendants did not within a reasonable time, or at any time afterwards, deliver the goods to the plaintiff, but that, by the defendants' negligence, they became wholly lost to the plaintiff. And if the breach had been so in form it would have been sufficient for the plaintiff to prove so much of the breach as would support his right of action; and as the onus of proving the delivery would rest upon the defendants, unless they proved a delivery within a reasonable time, the plaintiff's right of action, and, consequently, the breach alleged, would be established.

We are, therefore, of opinion that the plaintiff is entitled to retain his verdict; and that this rule must be discharged.

Rule discharged.

CASES

ARGUED AND DETERMINED 1843.

IN THE

COURT OF COMMON PLEAS,

IN

Easter Term,

IN THE

SIXTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco during this term were,

TINDAL Lord C. J.	ERSKINE J.
COLTMAN J.	CRESSWELL J.

HITCHCOCK and Another *v.* HUMFREY.

April 29.

ASSUMPSIT. The first count of the declaration stated, that before the making of the promise of the defendant, &c., to wit, on the 5th of *March* 1841, in

The defendant having guaranteed the payment of goods to be supplied by the plaintiffs to *A.* up to the 1st of *July*, gave on the 9th of *April* the following additional guarantee. "In consideration of your extending the credit already given to *A.*, and agreeing to draw upon him at three months from the 1st of the following month, for all goods purchased up to the 20th of the preceding month; I hereby guarantee the payment of any sum that shall be due and owing to you upon his account for goods supplied."

Held, a continuing guarantee.

Held also, substantially a guarantee for the payment of the price of the *goods* sold to *A.*, and not of the amount of the *bill* drawn upon him.

The declaration upon the guarantee, stated that the bill was drawn by the

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consideration of the plaintiffs agreeing to supply his the defendant's son, *Thomas Humfrey*, the younger, with goods upon credit, the defendant then guaranteed the payment, and promised the plaintiffs to pay them any sum owing to them that should be due the 1st day of *July* 1841; and thereupon afterwards, to wit, on the 9th of *April* 1841, in consideration that the plaintiffs would extend the credit already given as aforesaid to his the defendant's said son, and then agreed to draw upon him, the defendant's said son, at three months from the 1st of the following month for all goods purchased up to the 20th of the preceding month, the defendant then guaranteed the payment, and prómised the plaintiffs to pay them any sum that should be due and owing to them upon his said son's account for goods supplied. Averment: that the plaintiffs, confiding in the last-mentioned guarantee, did afterwards, to wit, on the 24th of *August* 1841, and on divers days and times between that day and the 20th of *September* 1841, and up to the last-mentioned day, sell to the said *Thomas Humfrey*, the younger, and the said *T. H.*, the younger, then purchased of the plaintiffs, certain goods to a large amount, to wit, to the amount of 35*l.* 18*s.* 6*d.*; and that they the plaintiffs afterwards, and after the said goods had been so sold and purchased as aforesaid, to wit, on the 1st of *October* 1841, the same being the first day of

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plaintiffs and accepted by *A.*, but that he did not pay the amount thereof, although the bill was presented when due, of all which the defendant had notice, and was requested to pay the amount of the bill, to wit, &c., but the same still remained due.

Held, a sufficient allegation of non-payment of the price of the goods.

Where a person not party to a bill, guarantees the payment by the acceptor, he is not entitled to require proof of presentment or of notice of dishonour. A plea to such a declaration, that the bill was not presented, and a plea, that the defendant had no notice of non-payment, were therefore held to contain no answer to the action; and the defendant having obtained a verdict upon issues joined upon these traverses, the plaintiffs had judgment *non obstante veredicto*.

e month following the said 20th of *September* 1841, to which day the said goods were so sold and purased as aforesaid, for and on account of the said ods, made their bill of exchange in writing, bearing te a certain day, to wit, the day and year last aforeid, and then directed the same to the said *T. H.*, the unger, and thereby required the said *T. H.*, the unger, to pay to the order of the plaintiffs, a certain m, to wit, the said sum of 35*l.* 18*s.* 6*d.*, three months er the date thereof, which period had elapsed before e commencement of this suit; and the said *T. H.*, the unger, then accepted the said bill, and promised the aintiffs to pay the same according to the tenor and ect thereof, and of the said acceptance thereof; but e said *T. H.*, the younger, did not pay the amount ereof, although the said bill was presented to him en it became due; of all which premises the defendt, afterwards, to wit, on the 5th of *January* 1842, had tice; and he was then requested by the plaintiffs to y them the amount of the said bill, to wit, the said sum 35*l.* 18*s.* 6*d.*; yet the defendant had not paid the same, any part thereof, to the plaintiffs, but the same still mained due, in arrear, and unpaid, &c. There was so a count upon an account stated.

Pleas: first, to the whole declaration, non assumpsit: condly, to the first count, that the plaintiffs did not sell the said *T. H.*, the younger, nor did the said *T. H.*, younger, purchase of the plaintiffs, the said goods in first count mentioned, *modo et formâ:* thirdly, that plaintiffs did not make the said bill of exchange in said first count mentioned, *modo et formâ:* fourthly, t the said *T. H.*, the younger, did not accept the d bill of exchange in the said first count mentioned, do et formâ: fifthly, that the said bill of exchange in e said first count mentioned was not presented to the id *T. H.*, the younger, for payment thereof, when the

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same became due, *modo et formâ:* sixthly, that he the defendant had not notice of the non-payment of the said bill in the first count mentioned, *modo et formâ.*

Upon all of these pleas issue was joined.

At the trial, before *Coltman* J., at the sittings for *Middlesex*, during last term, the following facts appeared:

The first guarantee, dated the 5th of *March* 1841, was in these terms: —

"To Messrs. *Hitchcock* and *Rogers.*

"In consequence of your agreeing to supply my son, *Thomas Humfrey*, junior, of *Stanmore*, *Middlesex*, with goods upon credit, I hereby, at your request, guarantee the payment, and agree to pay to you any sum owing to you that shall be due the 1st of *July* 1841."

The second guarantee, dated the 9th of *April* 184[illegible], was as follows: —

"To Messrs. *Hitchcock* and *Rogers.*

"In consideration of your extending the credit already given to my son, *Thomas Humfrey*, junior, of *Stanmore*, *Middlesex*, and agreeing to draw upon him at three months, from first of the following month, for all goods purchased up to the 20th of the preceding month, I hereby, at your request, guarantee the payment, and agree to pay you any sum that shall be due and owing to you upon his account for goods supplied."

The supply of goods by the plaintiffs to *T. Humfrey*, the younger, between the 24th of *August* and the 20th of *September* 1841, to the amount mentioned in the declaration, was admitted. The drawing and acceptance of the bill were proved; but there was no evidence of presentment to the acceptor, or of notice of non-payment to the defendant, so as to support the affirmative of the fifth and sixth issues.

A verdict was returned for the plaintiffs on the first four issues, and for the defendant on the fifth and sixth

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nnell Serjt., in *Hilary* term last (*January* 21st), ed a rule nisi to enter judgment for the plaintiff i fifth and sixth issues. He cited *Warrington* v. r (*a*), *Philips* v. *Astling* (*b*), *Swinyard* v. *Bowes* (*c*), ow v. *Wilkins* (*d*), and *Van Wart* v. *Woolley*. (*e*)

pas Serjt., at the same time, applied for a cross isi to arrest the judgment, upon the ground that iarantee declared upon was not a continuing itee, and that the declaration shewed no default defendant; and liberty was reserved to him to these points upon the rule obtained by the ff.

e case was now argued by

pas Serjt., for the defendant. The plaintiff was to prove the presentment and the notice, which d alleged in his declaration, and which were put e by the fifth and sixth pleas. The only default averred is, that the principal debtor did not pay ll *when presented*. It is clear that no action lie against the defendant, who is only a surety, it a default on the part of the principal; the ent of presentment is therefore material. [*Colt-*. The general rule is, that the debtor must seek s creditor. (*g*)] That does not apply to the case of n circulation. The rule there is, that the acceptor ay when the bill is presented. *Philips* v. *Astling* avour of the defendant. It was there held, that a guarantee of the price of goods to be paid by a ue notice of the non-payment must be given both

8 *East*, 242. And see *Esp. N. P. C.* 89.
2 *Taunt.* 206.
5 *M. & S.* 62.
1 *B. & C.* 10., 2 *D. & R.* 374.
(*e*) 3 *B. & C.* 439., 5 *D. & R.* 374.
(*g*) *Vide Bro. Abr.* Tender, pl. 20., *Litt.* s. 340., *Co. Litt.* 210 *b.*

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to the drawer and guarantee, unless both drawer and acceptor are bankrupts when the bill becomes due. All the cases assume that to be the rule unless some excuse for non-presentment be shewn. [*Cresswell* J. *Philips* v. *Astling* was decided upon the peculiar grounds of the case. The party who gave the guarantee was liable only in case the bill was neither paid by the acceptor nor by the drawer. It was necessary to shew the liability of the drawer by notice to him of the non-payment. Besides, it appeared in that case, that the bill probably would have been paid if it had been properly presented. *Erskine* J. This is a guarantee, not of payment of the bill, but of payment for the goods. *Cresswell* J. It amounts in effect to this: — "If you will trust my son for three months, from time to time, I will guarantee the payment of the goods."] It is clear that the plaintiffs were to draw on the son. And this is an action for the non-payment of the bill. The declaration contains no averment of non-payment for the goods. The only question is, whether the bill was paid on presentment. The terms of the breach are, that the said *T.* H. "did not pay the amount *thereof*," that is, of the bill, "although the said bill was presented to him when it became due." *Philips* v. *Astling* is therefore in point. The agreement there was to guarantee the payment of money as well as of a bill. [*Erskine* J. In that case the original debtor was the drawer of the bill. *Tindal* C. J. How is the present case distinguishable from *Warrington* v. *Furbor*?] In that case there was no mention of any bill in the guarantee. [*Cresswell* J. The declaration in this case sets out both the guarantees. In the first there is no mention of any bill. The second is to extend the credit given by the first. I should construe the payment mentioned in the second, to mean the same as that in the first. It amounts to a promise by the defendant to pay for the goods if the principal

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or makes default. If the breach is for non-pay- : of the bill, then the declaration does not aver that thing remains due for the goods.] That would be ound for arresting judgment. [*Coltman* J. The ch is, that the defendant did not pay, on request, e *amount* of the said bill, to wit, the said sum of 18*s.* 6*d.*"] That is the usual allegation in an n on a bill. [*Coltman* J. If the words "although said bill was presented to him" were struck out of declaration, the averment would then be, that the *T. H.* did not pay the amount of the bill when it me due. Would not that be sufficient?] It is sub- ed that it would not. The plaintiff was bound to e, and to prove, a presentment. In *Swinyard* v. es the true question was, whether the transaction unted to a payment. In *Holbrow* v. *Wilkins* it was ded that presentment and notice were not necessary, much as the parties guaranteeing had distinct notice he insolvency of the principal debtor. *Van Wart Woolley* has no application to the present case. That an action by a party against his own agents. In case no demand of payment is shewn; and the nging of the action will not have the effect of such mand.

As to the arrest of judgment, this was not a con- ing guarantee. [*Coltman* J. How do you under- nd the words "extending the credit?"] The credit y have been extended as to the *period* of payment, hout being extended as to the *amount*. [*Cresswell* J. rely the *amount* of the credit was extended as well as period. *Erskine* J. If it had been intended as a ited guarantee as to the period, would not the plain- have said, "in consideration of your extending the dit up to the 1st of *August*."] It was unnecessary to that, as the bill was to be drawn on the 1st of *May* at ee months. The meaning of the instrument is, that the

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defendant's son was to have three months' credit from the 1st of *May* for goods supplied up to the 20th of *April*, and that the defendant would guarantee the payment of goods supplied within that period. If the terms of the guarantee are not clear, the plaintiff cannot recover upon it; *Cole* v. *Dyer*. (*a*) It is consistent with every thing that appears upon the declaration, that the son may have paid for the goods at the time the second guarantee was given. [*Cresswell* J. He would hardly have accepted the bill in that case.]

Channell Serjt. (with whom was Sir *J. Bayley*), for the plaintiffs. The first question is, whether the facts stated in the fifth and sixth pleas, taken alone, constitute any defence to the action. And it is submitted they do not. The necessity of presentment in such a case as the present is not to be regulated by the law merchant, but by the rules applicable to the law of principal and surety. *Warrington* v. *Furbor* decides that where goods are sold, the payment of which is guaranteed by another party, and a bill is given by the purchaser for the price of the goods, which is dishonoured, it is not necessary to give notice to the surety. That case is precisely in point. Upon the statement in the declaration it must be assumed that the bill was not paid. The defence of non-presentment would have been valid if the defendant had been the *drawer* of the bill. In *Philips* v. *Astling* the vendee was the drawer of the bill, and the guarantee was for payment of that bill *by the drawer*; but he was not liable to pay unless he received due notice of default by the acceptor. *Swinyard* v. *Bowes*, *Murray* v. *King* (*b*), *Holbrow* v. *Wilkins*, and *Van Wart* v. *Woolley* are strong authorities for the plaintiffs. In the last-mentioned case

(*a*) 1 *C. & J.* 461. (*b*) 5 *B. & A.* 165.

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Abbott C. J. said "If a person deliver a bill to another without indorsing his own name upon it, he does not subject himself to the obligations of the law-merchant; he cannot be sued on the bill either by the person to whom he delivers it or by any other." That position reconciles all the cases.

(He was then proceeding to argue the question as to the arrest of judgment, but he was stopped by the court.

TINDAL C. J. The application made on behalf of the defendant to arrest the judgment in this case, depends upon two objections: first, that the second guarantee given by him is not a continuing guarantee; and, secondly, that there is no sufficient allegation in the declaration of any default in payment.

As to the first point, upon comparing the two guarantees as set out in the declaration, I think there is no doubt that the latter was a continuing guarantee. It appears that on the 5th of *March* the defendant guaranteed the payment of any sum owing to the plaintiffs, that should be due from *Thomas Humfrey*, the younger, upon the 1st of *July*. The parties seem to have met again on the 9th of *April*, when, in consideration of the plaintiffs' extending the credit already given to *T. Humfrey*, and agreeing to draw upon him at three months from the 1st of the following month, for all goods purchased up to the 20th of the preceding month, the defendant guarantees the payment, and agrees to pay the plaintiffs any sum that shall be due and owing to them upon their account for goods supplied. I cannot but think that if it had been intended that this second guarantee should only extend to one transaction of supplying goods, it would not have been couched in such general terms as "the following month," and "the preceding month," but would have followed the form

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of the first guarantee, which was limited to the payment of any sum due at a particular date, namely, the 1st of *July*.

As to the next objection, that no sufficient ground of action is shewn by non-payment, I think that this is a guarantee, for the payment not of the bill, but of the price of the goods. It is not a condition, that a bill shall be drawn, and that the principal shall have credit for three months. And if so, there is on the face of the declaration a sufficient allegation of non-payment. We might strike out all that part which relates to the demand on the acceptor, and the non-payment of the bill; and there would still remain sufficient to shew that the price of the goods was not paid. And although it has been urged that there ought to have been a specific demand for payment, and that bringing this action is not sufficient to obviate the necessity for such formal demand, still we cannot help seeing that there has been a demand. It is the same as in an action against an acceptor of a bill, in which case it is not necessary to aver or prove any demand upon him prior to the action. It is however, I think, sufficient to say that this is substantially a guarantee for the payment of the price of goods.

The next question, whether the verdict for the defendant is sufficient to bar the plaintiffs' judgment, or whether they are entitled to judgment *non obstante veredicto*, turns on the single point, whether a person who guarantees the payment of a bill drawn by the vendor of goods on the vendee for their price, puts himself in the same situation as the drawer of the bill. Because if so, then by the law-merchant he is entitled to insist that the bill should be duly presented to the acceptor, and that he should have notice of its dishonour. But I find no case by which a party so guaranteeing is put upon that footing. On the contrary, *Warrington* v. *Furbor* and *Swinyard* v. *Bowes* shew the true distinction between

ase of a drawer and that of a party giving such a
ıntee. The latter merely undertakes that the ac-
ır shall pay the bill; and he can only have a right to
on notice of dishonour, when some damage would
t to him from the want of it. No such damage is
ested in these pleas; and for these grounds I am of
on that they contain no answer to the action, and that
laintiff is entitled to judgment *non obstante veredicto.*

OLTMAN J. I agree that this is a continuing gua-
e, and that the terms "the following month," and
e preceding month," have a general application,
cannot be limited to any particular period.

pon the second question, I am also of opinion in
ur of the plaintiffs. The facts appear to be as
ged in the fifth and sixth pleas, and they falsify the
gations in the declaration as to the presentment of
bill, and notice of dishonour. The declaration,
efore, cannot stand unless these allegations may be
ck out. If they can, and there is still sufficient to
rge the defendant, the plaintiffs are entitled to judg-
nt. The promise alleged is, not to pay the bill, but
pay any sum that shall be due and owing to the
intiffs upon his (the defendant's) son's account for
ds supplied; although part of the consideration for
promise was, the plaintiffs' agreeing to draw a bill
bills upon the defendant's son. It appears from the
laration, that a bill was drawn pursuant to the gua-
tee. And it is put as though the want of presentment
the bill at maturity, is equivalent, in law, to a pay-
nt, as far as regards the defendant. But as he is not
arty to the bill, he is not entitled to the benefit of
law-merchant in this respect. He is a mere surety;
l in order to discharge him from his liability, there
st be, not only a failure of presentment and notice of
honour, but some damage resulting to him there-

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from. No such damage is alleged in this case. The bill was not paid by the principal, and the defendant has not performed his promise.

It is further said, that the declaration contains no allegation that the goods were not paid for; but there is, in substance, such an allegation. There is a statement that the bill was drawn "for and on account of the goods" which had been supplied by the plaintiffs to the defendant's son, that this bill was accepted, and that the amount thereof was unpaid; and that is, by implication, an averment that the goods were not paid for. I think, therefore, that the declaration, after striking out the allegations which are traversed by the fifth and sixth pleas, contains a sufficient statement of a cause of action, and, consequently, that the plaintiffs are entitled to judgment upon the issues raised by these pleas, *non obstante veredicto*.

ERSKINE J. Upon the point as to the arrest of judgment, it has been argued that the goods were not supplied within the period covered by the guarantee; and that raises the question whether it was a limited or continuing guarantee. And I think that the terms shew that it was intended for a continuing guarantee. Taking the first and last sentences of the document, it is clear that they can only bear this construction. For the guarantee would then stand thus: "In consideration of your extending the credit already given my son, I hereby, at your request, guarantee the payment, and agree to pay you any sum that shall be due and owing to you upon his account for goods supplied." Then the question is, whether the intervening sentence as to drawing at three months, was intended to limit the operation of the guarantee. If that had been the intention of the parties, nothing would have been easier than to have named the time up to which the goods were to be supplied. I am

of opinion, therefore, that this is a general running guarantee.

It was then said that the declaration contains no distinct allegation of any default in the payment of the price of the goods on the part of the principal debtor. But it is alleged that the goods were supplied, and that a bill was drawn for and on account of them; that the bill was not paid, and that the amount still remains due. The non-payment, at the expiration of the period of credit, is a default in the payment of the price of the goods; and I think that such non-payment is sufficiently, though not directly, alleged.

Then there is the further question as to entering judgment for the plaintiffs on the fifth and sixth pleas, *non obstante veredicto.* I do not consider it necessary to go through the cases that have been cited upon this point. The effect of them amounts to this, and no more, that it is not necessary that a person who guarantees the payment of a bill, not being a party to it, should have notice of its dishonour, unless, by reason of non-presentment or of want of notice, he has suffered some loss or damage. The pleas under consideration contain no statement of any damage to the defendant, and therefore they present no sufficient defence to the action.

CRESSWELL J. I am of the same opinion. The document in question is clearly a continuing guarantee. Its terms admit of no reasonable doubt; and we are not to examine such an instrument minutely in order to put upon it a fanciful construction. The guarantee given in *April*, speaks of the first of the *following* month and the 20th of the *preceding* month; if that sentence is to bear the strict interpretation which the defendant contends for, the term "preceding month" would mean *March;* but the payment of supplies in that month had been already guaranteed by the previous instrument; and

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the parties were agreeing to *extend* the credit. It could not mean *April*, for that was the month in which the document was given, and the parties would then have said — not the "preceding" — but the "present" or the "current" month. The guarantee was clearly intended to extend to all future months, it being agreed that on the first of each month the plaintiffs were to draw upon the principal debtor for all goods supplied up to the 20th of the then preceding month.

The next question is, whether the default in the payment for the goods is sufficiently alleged. The declaration is certainly not framed with any great accuracy. The pleader rather seems to have thought that it was a guarantee to pay the bill. But I think that the declaration does, substantially, contain an averment that the price of the goods remains due.

Then, how does the defendant seek to discharge himself by the fifth and sixth pleas? The fifth, — which is the material one, — traverses the allegation in the declaration that the bill was presented to the acceptor when due. But had the plaintiffs taken upon themselves the duty to present the bill to the acceptor in order to have an action against the guarantee? According to the current of authorities, the omission of such a presentment is immaterial unless the party who has given the guarantee sustains some damage by the laches. It is for him to set up that as a defence; and the defendant has not done so here.

Rule absolute. (*a*)

(*a*) See *Allnutt* v. *Ashenden*, *antè*, 392.

CHALK *v.* WALTON.

May 1.

THE defendant having given a warrant of attorney to secure a debt of *50l.* with interest, the sum for ıich judgment was to be confessed being only *50l.*, *owling* Serjt. now moved for liberty to enter up dgment as of this term for the sum of *50l.*, together ith such further sum as one of the masters of this urt should find to be due for interest thereon, purıant to the warrant of attorney. He referred to an ıreported case of *Page* v. *Jadis*, where, it was said, iis court had, under similar circumstances, granted a ke rule on a former occasion.

The court (after conferring with the masters) granted rule, which, although the warrant of attorney was ıder twenty years old, was a rule nisi.

Where an old warrant of attorney had been given to secure a debt and interest, the sum for which judgment was to be confessed being for the amount of the debt only, the court granted a rule to enter up judgment for the debt, and so much for interest as the master should find to be due thereon.

GOFF *v.* HARRIS.

May 1.

DEBT. The first count of the declaration was upon a demise, for a quarter's rent; the second, for fixres sold and delivered; and the third, upon an account ıted.

The plaintiff, by his particulars, claimed *5l. 5s.* for a

The acceptance of a demise of a house containing fixtures, does not raise an implied contract to pay for such fixtures.

In debt for rent on a demise for years, with a count for fixtures sold, the plain- claimed by his particulars *5l. 5s.* for rent, and *12l.* for fixtures. The deıdant paid *11l. 5s.* into court. Held, no admission of the defendant's liability respect of fixtures, to a greater amount than had been paid into court.

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quarter's rent to *Christmas* 1842, and 12*l.* for "fixtures, as per valuation."

Plea: to the whole declaration, payment into court of 11*l.* 5*s.*, and *nunquam indebitatus ultrà*.

At the trial, before the under-sheriff, the only question was, as to the defendant's liability to pay for the fixtures. It was proved that there were fixtures on the premises at the date of the demise mentioned in the declaration; but there was no proof of any contract by the defendant to pay for them. A letter from the defendant, dated the 15th of *January* 1843, was read, in which he said, "Though I do not think myself liable for the fixtures, I will send an appraiser in a few days." There was no evidence that an appraiser had been sent by the defendant, though it was proved that the fixtures were valued at the amount claimed, by two brokers, in the following *February*. On the part of the plaintiff it was contended that the fact of the defendant having taken to the fixtures raised an implied promise to pay for them; and that by the payment into court of a larger sum than was claimed for rent, a contract to that effect was admitted. The plaintiff had a verdict, leave being reserved to the defendant to move to set it aside and enter a nonsuit.

Channell Serjt., on a former day in this term, obtained a rule nisi accordingly, citing *Kingham* v. *Robins*. (*a*)

Byles Serjt. now shewed cause. The 6*l.* paid into court over and above the plaintiff's claim for rent must have been paid on account of the fixtures. *Kingham* v. *Robins* is distinguishable from the present case. In that case there was not only no evidence of an agreement to take the fixtures, but there was none to shew that they had ever come into the defendant's possession. In the

(*a*) 5 *M.* & *W.* 24. *S. C. nom. Hingham* v. *Robins*, 7 *Dowl. P. C.* 352.

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of a chattel, a contract to pay may be implied from ange of possession. [*Cresswell* J. There may be istinction. If a fixture is delivered as a chattel by wner to another person, there may be an implied act of sale. But if a house is let containing fix- it will be a question whether they are let as part e house or delivered upon a separate contract of The defendant's letter, though it must be ad- d it is rather more in accordance with the ground a he now takes, was still *some* evidence, however , for the plaintiff; and the question upon the pre- motion is, not whether the verdict was right, but her there was *any* evidence to go to the jury on lf of the plaintiff. The courts appear to be at issue the effect of an admission on the record. In *Ed- ls* v. *Groves* (*a*) it was said by *Alderson* B. that the ssion of a fact on the record amounts merely to a er of requiring proof of that fact; but that if the party seek to have any inference drawn by the from the fact so admitted, he must *prove* it like ther fact. But in *Bingham* v. *Stanley* (*b*) that doc- was, after consideration, dissented from by the t of Queen's Bench. In the present case there is ly an admission as to some contract relating to fix- ; and there is no evidence of any other fixtures those in question. Payment of money into court e a judgment by default. If the present question arisen upon a motion to set aside a writ of inquiry, ourt would not have interfered.

hannell Serjt., in support of the rule. *Edmunds* v. *es* and *Bingham* v. *Stanley* were both cases of ial contracts. And whichever may be the right de- n, it cannot affect the present case, which is upon

(*a*) 2 *M. & W.* 642. (*b*) 2 *Q. B.* 117., 1 *G. & D.* 237.

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an indebitatus count, where the contract is divisible. It may be conceded that the case stands upon the same footing as if there had been a judgment by default; but that would only admit the plaintiff's right to a verdict to *some* amount. So here, the 6*l.* paid into court may be an admission that so much was due for fixtures; but it goes no further. There was no evidence of any contract as to the fixtures, and the presumption would be that they were demised with the house; *Colegrave* v. *Dias Santos* (*a*), *Longstaff* v. *Meagoe*. (*b*) There was not even any evidence that the defendant entered into possession. The allegation of entry in the declaration was not traversable; *Bird* v. *Higginson* (*c*), *Parkinson* v. *Whitehead* (*d*); and therefore it was not admitted. But supposing the allegation were traversable, the plea would only admit the demise and the entry under it, and would not shew any contract as to the fixtures. The defendant's letter amounts to a repudiation of any contract.

TINDAL C. J. I think the safer way to deal with this case will be to look at it as if no money had been paid into court; in which case the question would have been, whether there was any evidence of a sale of fixtures. The plaintiff would have put in the demise to prove his first count. But a demise is not evidence of a contract to pay for fixtures. Then there is the defendant's letter; but that does not help the plaintiff, for the defendant there says that he does *not* think himself liable for the fixtures. That is no evidence of a contract. He says, however, that he will send an appraiser; but there is no proof that he did so. Upon the whole, I think there is no

(*a*) 2 *B.* & *C.* 76., 3 *D.* & *R.* 255.

(*b*) 2 *A.* & *E.* 167., 4 *N.* & *M.* 211.

(*c*) 2 *A.* & *E.* 696., 4 *N.* & *M.* 506., *Affirm. in Cam. Scac.* 6 *A.* & *E.* 824.

(*d*) 2 *M.* & *G.* 329.

evidence to support the claim for fixtures, and that the *rule* for entering a nonsuit must be made absolute.

COLTMAN J. I am of opinion that there is no admission on the pleadings even of an entry by the defendant into possession of the premises. The action is brought upon a demise for years; on which debt will lie without any entry. And I also think that the payment into court is no admission of a contract in respect of the fixtures, at least not as to their value. I form this opinion, looking at the case independently of the defendant's letter. There is no former letter in evidence to which the defendant's may have been an answer. If there had been, it might possibly have explained the defendant's letter. But, taking that as it stands alone, he says, in express terms, that he does not consider himself liable for the fixtures. The plaintiff has therefore, I think, failed to make out any case in respect of them.

ERSKINE J. I am of the same opinion. The payment into court admits the contract declared upon in the first count, and also that the defendant owed the sum of 6*l.* in respect of some contract for some fixtures somewhere or other. But what evidence is there of any contract as to these particular fixtures? The demise does not prove a contract to pay for them. The fact of their having been valued does not prove it; as it is not shewn that they were valued by the defendant's authority. The letter, so far from proving a contract, denies the defendant's liability. There is therefore no evidence of any contract in respect of the fixtures.

CRESSWELL J. I am of the same opinion. A party, by accepting a lease, and taking possession, of a house, does not contract to pay for fixtures. The defendant's

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letter was clearly no admission. What is said about sending an appraiser may be ambiguous; but it was not shewn that any was sent.

Rule absolute.

May 1.

CHILVERS *v.* GREAVES.

Where the judge who tries a cause recommends a verdict for the plaintiff with nominal damages, but the jury give substantial damages, such verdict cannot be treated as perverse.

TRESPASS, *quare domum fregit*, and for expelling the plaintiff from his dwelling-house.

At the trial before *Maule* J. at the sittings during this term, it appeared that the defendant, an attorney, had agreed to let the house in question, and had delivered the keys thereof to the plaintiff; but the defendant afterwards obtained the keys back by stratagem, and refused to let the plaintiff into possession of the house. The learned judge told the jury that the plaintiff must have a verdict; but that as no special damage was alleged or proved, they would probably think that nominal damages would be sufficient. The jury inquired what sum would carry costs, but his lordship declined to inform them. They returned a verdict for the plaintiff, damages 5*l*.

Murphy Serjt. now applied for a new trial, upon the ground that the verdict was perverse, or to reduce the damages. [*Tindal* C. J. In such a case the defendant would have acted wisely in paying money into court. The verdict can hardly be said to have been perverse, as it *must* have been given for the plaintiff. As to the reduction of damages, an application can be made to the learned judge who tried the cause.]

Per curiam;

Rule refused.

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May 3.

THIS was an action of trover for certain books and papers of the plaintiff, which had originally come o the hands of the defendant as the official assignee nder a fiat in bankruptcy issued against the plaintiff in he year 1840. This fiat was afterwards, with the con-nt of all the creditors who had proved their debts nder it, annulled, by order of the Lord Chancellor, earing date the 10th of *December* 1841; and imme-ately afterwards the books and papers were demanded om the defendant, who refused to deliver them up to e plaintiff; and thereupon this action was commenced the 4th of *January* 1842. (*a*)

Or the 25th of *January* 1842, a second fiat was issued gainst the plaintiff upon the petition of *John Vickery roughton*, who had not come in under the former fiat; nd on the 12th of the following *May* the plaintiff was djudged a bankrupt, and on the 25th of *May* the de-ndant was again appointed official assignee. But, in e mean time, namely, on the 22d of *February*, this ction had been tried; and in consequeuce of the delay

A. was appointed official assigee, under a fiat in bankruptcy against *B.*, which on the 10th of *Dec.* 1841 was annulled. On the 4th of *Jan.* 1842 an action of trover was brought by *B.* for his books, &c. against *A.* On the 25th a second fiat was issued against *B.* On the 22d of *Feb.* the action was tried, and *B.* had a verdict for 1000*l.*, to be reduced to

. upon *A.*'s giving up the books, &c. On the 12th of *May B.* was adjudged bankrupt, and on the 25th *A.* was again appointed official assignee. *B.* did t surrender under the second fiat, and notice was given by the assignees to the torney who had brought the action, not to take any further proceedings against . The attorney, however, on the 8th of *July* entered an *incipitur* in the aster's book, and gave notice of taxation. The court, on the application of stayed all proceedings upon payment of the attorney's costs up to the date of e second fiat.

Where, upon enlarging a rule, it is made a term that any further affidavits all be filed before a certain day, a party is not precluded from using an affi-vit which had been sworn before the day fixed, but which was resworn after at day for the purpose of rectifying a mistake in the *jurat*.

(*a*) *Vide S. C. antè*, Vol. IV. 461.

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in opening the fiat, occasioned by circumstances not material to the present inquiry, the defendant was not in a condition to plead the plaintiff's bankruptcy, and a verdict was therefore taken for the plaintiff, by consent, for 1000*l.*, the damages laid in the declaration, subject to be reduced to 40*s.* on the delivery up to the plaintiff of the books and papers. The bankrupt having omitted to surrender himself under the second fiat, and having gone abroad, notice was given by the assignees to the attorney who had commenced and carried on the suit for the bankrupt, not to take any further proceedings in the action against the defendant *Gibson*, notwithstanding which notice the attorney afterwards on the 8th of *July* 1842, entered an *incipitur* of the judgment in the master's book, and gave notice of taxing the plaintiff's costs, and thereupon the attorney for the defendant procured a judge's order for staying all proceedings in the cause till the fifth day of *Michaelmas* term, with leave to the parties to apply to the court.

Bompas Serjt in last *Michaelmas* term (7th of *November*) upon affidavits of the facts above stated (*a*) had

(*a*) The above summary contains all the material facts as stated by *Tindal* C.J. in delivering the judgment of the court.

It also appeared that upon the 26th of *Jan.* the following notice was served upon the defendant.

"In the matter of *Thomas Ouchterlony*.

"We, the undersigned, solicitors for and on behalf of *John Vickery Broughton*, of &c., do hereby give you notice that a docket hath been struck, and a *fiat* issued, against the said *T. O.* at the instance of the said *J. V. B.*, and the said *fiat* is intended to be forthwith prosecuted. And we do further as aforesaid, give you notice, and require you, not to part with any books of account, letters, documents, deeds, papers, moneys, property or effects of any kind, which may be in your hands, power, or custody, now or late belonging to the said *T. O.* or his creditors or estate, or to you as official assignee with any other assignee or assignees appointed under a *fiat* in bankruptcy, lately in force against the said *T. O.*, but to retain and keep the same, and every of them, for the benefit of

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ed a rule calling upon the plaintiff to shew cause l proceedings on the postea should not be stayed, ment to the plaintiff's attorney, of the costs of the up to the date of the second fiat, or why the taxf costs should not be stayed on the judgment, the ıot having been revived, and the assignees made thereto.

s rule was enlarged on the tenth day of *Michael*rm (25th of *November*) to the fifth day of *Hilary* ıst, upon the usual terms that all further affidavits the plaintiff intended to use at the time of ıg cause, should be filed one week before the first *Hilary* term. And it was further enlarged on ıt day of *Hilary* term (31st of *January*) upon the that no further affidavits should be filed.

T. Wilde and *Channell* Serjts. upon proceeding to ause, on a former day in this term (1st of *May*) ed to read an affidavit of the plaintiff's attorney had been sworn before the date when the rule irst enlarged (namely on the 24th of *November*); ich, in consequence of a mistake in the jurat(*a*), een re-sworn after the time limited (namely on th of *January*.) They submitted that the limitas to the filing of further affidavits, only applied to its to the merits; and that they might be consias applying for leave to file the affidavit in question otwithstanding the time had elapsed which was l by the rule.

pas and *Manning* Serjts. contrà, objected upon ound that the court would now allow further affi-

s under the said *fiat* ued, or to be disposed under as may be law- (Signed, &c.)

The jurat was originally form: —

"Sworn, &c. the 25th day of *Nov.* 1842. Before, &c." The figures "25th," had been erased, and "24th" interlined by the officer of the court.

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davits to be filed by the plaintiff, without giving the same advantage to the defendant.

Per curiam. The meaning of the rule was that no further affidavit should be filed by the plaintiff as to the merits; but this is not a further affidavit; it is in effect the same affidavit that was sworn before the rule was enlarged and which was re-sworn owing to a mistake of the officer of the court. (*a*)

Sir *T. Wilde* and *Channell* Serjts. then shewed cause. The court of bankruptcy was the proper tribunal to apply to in this case, and not this court where the question cannot be properly discussed. The action was brought before the second fiat was issued; and it was tried before the adjudication of bankruptcy under that fiat. The plaintiff, therefore, had a good right of action at the time he obtained the verdict, and the court has no power to interfere now to deprive him or his attorney of the costs. [*Tindal* C. J. If a sum of money were to be given to the plaintiff as costs, it would be the property of his assignees under the second fiat.] Still the plaintiff has a right to have the judgment perfected, even for the benefit of the estate. [*Erskine* J. May not the defendant say that he has done what was required of him, and given up the books &c. to the assignees?] That was certainly not the meaning of the arrangement at nisi prius. And even then, the plaintiff would be entitled to his judgment and costs. The object of the present application is not to secure the benefit of any fund to the creditors. It is made to obviate the necessity, either of a *scire facias* or of an *auditâ querelâ*. But in the former case it is made too soon, and in the latter,

(*a*) The affidavit in question merely stated the dates of some intermediate proceedings connected with the cause, which are not material to the point decided.

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ate. If it be in lieu of a *scire facias*, it must be for purpose of reviving a judgment, or of introducing tional parties to the record; and, in the latter case, ust suppose the existence of a valid and completed ment. In 2 *Wms. Saund.* 72 k. it is said, "If a man ver final judgment, upon which the defendant brings rit of error, and the plaintiff become a bankrupt ing the writ of error, his assignees ought to proceed n affirmance of the judgment in the bankrupt's e, and then sue out a *scire facias* in their own names the judgment, to have execution." (*a*) But in this the assignees could not have a *scire facias* upon the ment, as no judgment has in fact been signed. *Zman* J. If the court sees that no fruit can come e plaintiff from the judgment or the taxation, why ld they not interfere to stay the proceedings?] court will not administer equitable relief upon sum- y application except where the party applying has e *legal* right; which the defendant has not in this . Nor can the application be supported upon the nd of its being made in lieu of an *auditâ querelâ*. *Tidd's Prac.* p. 1131. (*b*) it is said, "Where the is clear, and the application recent, the courts will rpose in a summary way, and relieve the party upon ion, without putting him to an *auditâ querelâ*. But will never do it when the fact is disputed, or there been a long acquiescence, and several steps have taken subsequent to the award of execution, or the nd of relief is such matter of fact as may be proper e tried by a jury." In this case, the ground of re- if any, is the bankruptcy of the plaintiff; and that is atter of fact which ought not to be removed from

(a) Citing *Kretchman* v. *Winter*, 1 *T. R.* 463.; *Winter* v. *Kretchman*, 2 *T. R.* 45.; *Monke* v. *Morris*, 1 *Mod.* 93., 1 *Vent.* 193.; *Hewit* v. *Mantell*, 2 *Wils.* 372. 378.

(*b*) 9th ed.

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the consideration of a jury. But in whatever light the application is considered, the lien of the attorney for his costs ought to be taken into account. They cited also *Bibbins* v. *Mantell* (*a*), *Hewit* v. *Mantell* (*b*), *Kinnear* v. *Tarrant* (*c*), *Barnes* v. *Maton.* (*d*)

Bompas and *Manning* Serjts. in support of the rule. The plaintiff's attorney has no claim, legal or equitable, for his costs beyond the date of the second fiat, up to which time it is proposed to give them to him. It may perhaps be doubted whether he is entitled to them even up to that time. The present application is made for the purpose of relieving the defendant from the necessity of resorting to his *auditâ querelâ*, to which remedy he is clearly entitled. In *Bac. Abr.* tit. *Audita Querela* (B.) it is said, "If *A.* as administrator recover damages in trover against *B.*, and after his administration is repealed and granted to another, upon a surmise that *A.* intends and endeavours to sue execution, *B.* may have an *auditâ querelâ*; for by the repeal of the administration, the power of *A.* is absolutely determined." So here, by the adjudication of bankruptcy, the power of the plaintiff to proceed with the judgment, is absolutely determined, and is vested in his assignees under the second fiat; so that neither the plaintiff nor his attorney can have any right to take further proceedings without the consent of the assignees. It is argued that there is no final judgment here; but judgment is sufficiently entered up, when it is signed in the master's book; *Fisher* v. *Dudding.* (*e*) [Sir *T. Wilde* Serjt. The entry in the master's book amounts to nothing till the costs are taxed. *Coltman* J. In that case they *were* taxed.] It is further said that by granting this application the question as to the bankruptcy

(*a*) 2 *Wils.* 358.
(*b*) *Ib.* 374.
(*c*) 15 *East*, 622.
(*d*) *Cit. ib.* 631.
(*e*) *Antè*, Vol. III. 238.

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be withdrawn from the consideration of a jury; but 5 & 6 *Vict. c.* 122. *s.* 24. (*a*) the plaintiff is now cluded from disputing the bankruptcy. [*Cresswell* J. d not this case come within the exception in that ? The right to the books accrued to the plaintiff ore that act passed. (*b*)] The court in considering estion will look at the rights of the parties when plication was made. The defendant was bound p the books in question, which had been placed hands as official assignee. The court certainly not order him to give them up in the present f things; yet that will be the effect of the failure present application, unless the defendant pays the the amount of the verdict. [*Tindal* C. J. The uestion in the case is, with respect to the costs. nly point is, whether the defendant has offered

Which enacts, "that if krupt shall not (if he ithin the United King- the date of the ad- ion), within twenty-one ter the advertisement of kruptcy in the *London* e, or (if he were in any part of *Europe* at the the adjudication), with- ee months after such isement, or (if he were ere at the date of the cation), within twelve after such advertise- have commenced an ac- suit, or other proceeding pute or annul the *fiat*, hall not have prosecuted ame with due diligence with effect, the *Gazette* ining such advertisement conclusive evidence — in es as against such bank- and in all actions at law its in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit, had he not been adjudged a bankrupt, — that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such *fiat*, and that such *fiat* was sued forth on the day on which the same is stated in the *Gazette* to bear date, saving all rights which shall have accrued to any such person as aforesaid previous to the commencement of this act, and in respect of which any proceedings shall be pending at the time of the commencement of this act, which shall be adjudged and determined as if this act had not been passed."

(*b*) The 5 & 6 *Vict. c.* 122. received the royal assent on the 12th of *August*, but came into operation 11th of *Nov.* 1842.

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enough in offering the costs up to the issuing of the second fiat. He certainly should offer enough to cover the attorney's lien.] When the fiat issued the defendant received a notice from the petitioning creditor not to deliver the books to the plaintiff; if he had delivered them up after that notice, he would have been liable to an action. From that time he was justified in keeping them. Up to that time he may be considered as wrong-doer, and therefore, up to that time, he proposes to pay costs. [*Tindal* C. J. Could he not have applied to the court of Review, or to the court of Chancery, to stay the action?] It is submitted that no such application would have been entertained before the adjudication which was not till after the trial. Besides, the defendant would probably have been told that a court of common law would do ample justice in the case. The second fiat being issued before the trial, it was a wanton expenditure of money on the part of the plaintiff's attorney, to proceed with the action; and such an experiment ought not to be a source of profit to him. As to the latter part of the rule, it is submitted that the bankrupt is now proceeding in the action without the consent of his assignees; which he cannot effectually do. [*Cresswell* J. In that case the defendant cannot be hurt.] He has a right to apply to the court, *quia timet*, though not actually damnified. (*a*) [*Cresswell* J. Is there any case in which an *auditâ querelâ* has been held to lie, where the party to the record was not entitled to execution?] Several such cases are mentioned in 2 *Wms. Saund.* 148 n.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. After stating the facts of the case, (*ut suprà*, p. 579.) his lordship proceeded as follows: —

(*a*) See *Co. Litt.* 100. *a.*

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In *Michaelmas* term the defendant applied to this court, and obtained a rule calling upon the plaintiff to shew cause why all proceedings on the postea should not be stayed, on payment, to the plaintiff's attorney, of the costs of this action, up to the date of the second fiat in bankruptcy against the said plaintiff, or why the taxation of costs should not be stayed on the present judgment against the defendant, the same not having been revived and the assignees made parties to such judgment. This rule having been enlarged, cause was shewn against it on *Monday* last, when it was insisted on the part of the defendant, that, all the bankrupt's title to, and interest in, the verdict and cause of action, had become vested in his assignees under the second fiat, neither the bankrupt nor his attorney could take any further proceedings in the suit without the consent and concurrence of the assignees, and that, as the title of the assignees had not been completed till after the verdict, the defendant had had no opportunity of pleading their title in bar to the plaintiff's further proceedings in the action; and therefore, that, he was, by law entitled to his remedy by writ of *auditâ querelâ*, and, consequently, to the more summary relief, by staying the proceedings on motion; which modern practice has substituted, in all cases, where the defendant's title to the writ of *auditâ querelâ* is clear.

The question was ably argued at the bar on both sides; and we delayed our decision that we might ascertain from the affidavits upon what terms it would be right, under all the circumstances of the case, to grant the summary relief applied for.

Upon examination it appears, as was indeed admitted at the bar, that there is no statement of any act of bankruptcy that would carry back the title of the assignees beyond the date of the fiat. There is nothing, therefore, to shew that the plaintiff had not originally a good cause of action, by the refusal of the defendant to deliver up

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the books and papers, in which, even by relation, it does not now appear that he had at that time any property or interest, as assignee. The verdict, therefore, stands unimpeached by the subsequent proceedings. But, as, upon the 25th of *May*, when the assignees were appointed, the bankrupt's interest in that verdict became vested in his assignees, and as no judgment had been then signed in the cause, and as the plaintiff's attorney was expressly warned by the assignees against taking any further steps in the cause, we think that the attempt by the attorney to proceed to tax the costs and sign judgment was a sufficient ground for the present application, and the only doubt that we have entertained has been as to the extent of costs which the defendant should be called upon to pay. He has, by his rule, offered to pay the costs up to the date of the *fiat*, which is more than the attorney would be able to recover so long as the fiat remains in force; for, independently of any claim on the part of the defendant to the writ of *audita querela*, as to which it is not necessary to give any opinion, all control over the proceedings in the actions being now vested in the assignees, unless the attorney could compel him to proceed to judgment and execution, he could never make his lien available, even to the amount now offered by the defendant; and his only remedy would be, by proof under the fiat, for the costs incurred before the date of the fiat, and by action against the bankrupt, for subsequent costs, if they were incurred by his authority.

If, indeed, the creditors could, by the removal of the defendant *Gibson*, and the substitution of another assignee, be placed in a position to insist upon the assignees proceeding to judgment and execution for the 1000*l.* for the benefit of the estate, the attorney might be able to work out his lien through the rights and interests of the creditors. But we think the assignees could not, under the circumstances of this case, be permitted to enter up

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ıt for more than the 40*s.*: and, as the attorney ave no claim upon the estate for costs incurred e date of the fiat, the creditors would have no in proceeding to judgment and execution for the cept for the purpose of securing the estate from of of the bankrupt's debt to the attorney for the ıcurred prior to the date of the fiat: and we lso, that neither the bankrupt nor his attorney y equitable claim to indemnity for the costs in- by them in forcing on the trial of the cause after was issued, and whilst its validity was uuder dis-

ıe assignees, therefore, could not be called upon, benefit of the estate, to proceed to execution, ex- the purpose of securing to the bankrupt's attorney ment of his costs up to the date of the fiat from ther fund than the bankrupt's estate; and, as the ınt proposes to afford that security by paying osts; and, as we consider the prosecution of the ıfter the date of the fiat as an experiment of which orney voluntarily incurred the hazard, we think justice will be done to all parties by making the solute for staying all further proceedings, upon ıt by the defendant to the plaintiff's attorney of ts incurred up to the date of the fiat, to be taxed master.

Rule absolute.

May 6. TODD *v.* CROSBY.

Semble, that where service of the writ of summons is upon the defendant's wife, the plaintiff should not enter an appearance, but should move for a *distringas*.

CHANNELL Serjt. applied for a *distringas*. The appointments and calls had been regular and there had been a service of the writ of summons on the wife. [*Cresswell* J. Why cannot the plaintiff enter an appearance?] He must shew a personal service on the defendant. [*Tindal* C. J. The present motion seems to be the safer course.]

Per curiam;

Rule granted.

May 6. WILKINSON *v.* WHALLEY.

A., to whom *B.* was indebted, received a bill from *B.* "to get discounted or return on demand." *A.* sent the bill to *C.* with directions to place it to *A.*'s account with *C.*; which *C.* did, minus the discount.

TROVER, for a bill of exchange. Pleas: not guilty, and not possessed.

At the trial before *Tindal* C. J. at the sittings for *London* after *Hilary* term last, the following facts appeared in evidence. The plaintiff had handed over the bill in question, drawn by himself on *Webber* and Co. for 170*l.*, to the defendant, in order that the latter might get

Held, in trover for the bill by *B.* against *A.*, that this was substantially a *discounting* of the bill by *A.*, and that *A.* was entitled to a verdict under a plea of *not possessed*.

Semble (*per Coltman* and *Cresswell* JJ.) that *A.* was also entitled to the verdict under *not guilty*.

The plaintiff's counsel at the trial interrupted the summing up, conceiving that there was a misdirection in law, and elected to be nonsuited. The court allowed him to move to set aside the nonsuit.

Query (*per Cresswell* J.) Whether a plaintiff is strictly entitled to do so.

t discounted, when the defendant gave the following nemorandum to the plaintiff: —

" Received of *William Wilkinson*, a bill for 170*l.*, three nonths from the 12th *March* 1840, for discounting or eturn on demand.

" *Leeds*, *March* 12, 1840.

" (Signed) *Joseph Whalley.*"

The defendant immediately sent the bill to Messrs. *Gaudell* and *Higgs*, bill-brokers in *London*, with the following letter: —

" Gentlemen, — We inclose you a bill of *James Webber* nd Co., which we shall feel obliged by your getting accepted, for 170*l.* As it is probable we may have other ills from the same party, we shall be glad if you will ive us your opinion of the house. If you are satisfied f the respectability of the party, perhaps you will have o objection to put it to our account. We understand hey stand well in *London.*

" Yours, &c.

" (Signed) *Joseph Whalley.*"

The amount of the bill, less the discount, was placed y *Gaudell* and *Higgs*, to the credit of the defendant's ccount with them; and upon being applied to by the laintiff to return the bill in question, they refused to do o. An action of trover was thereupon brought against iem by the plaintiff; at the trial of which, the present efendant *Whalley* was called as a witness for the plainff to prove the above mentioned documents, when he wore that the bill had been given to him by the plainff in part payment of a debt of 300*l.*, and that he was o retain the amount of the bill if he could get it disounted; and that the then defendants were ignorant iat the bill had ever belonged to the plaintiff. A verict was thereupon found for the then defendants. The

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present action was brought after a demand and refusal of the bill; and in order to prove the defendant's signature to the documents in question it became necessary, on the part of the plaintiff, to put in the defendant's evidence given on the former trial. No evidence was given on the part of the defendant; but it was urged on his behalf that the action was wrongly conceived and ought to have been a special action on the case.

The Lord Chief Justice, in summing up, told the jury that the question in the case was, whether the defendant had wrongfully passed the bill, or whether he had authority for so doing; and he left it to them to say whether or not there had been a wrongful conversion, stating that if the defendant had dealt with the bill in the manner he had done, with the assent of the plaintiff, the latter had no right to recover. The plaintiff's counsel thereupon interrupting the Lord Chief Justice, elected to be nonsuited.

Channell Serjt. on a former day in this term (21st of *April*), moved to set aside the nonsuit and have a new trial, upon the ground of misdirection. He submitted that although where a plaintiff elected to be nonsuited in consequence of misdirection as to the weight and effect of the evidence, he could not move to set aside the nonsuit, he might do so where the misdirection was as to the law or the effect of the pleadings; *Simpson* v. *Clayton*. (a) There being no plea of leave and licence upon the record, the only question for the jury was whether there had been a conversion in fact, and not whether the conversion was wrongful; *Stancliffe* v. *Hardwick* (b), *Vernon* v. *Shipton*. (c) [*Coltman* J. Your argument would be the same if the defendant had actually discounted the

(a) 2 *New Ca.* 467., 2 *Scott*, 691. See also *Austin* v. *Evans*, *antè*, Vol. II. 430.

(b) 2 *C. M. & R.* 1.

(c) 2 *M. & W.* 9.

Even then, the defendant must have pleaded
nd licence. [*Tindal* C. J. What evidence is there
f actual conversion, but the demand and refusal?
the case of a bailment. You give a thing to a
do something with it, and you say he has not
t.] The actual conversion consisted in paying
o *Gaudell* and Co., on his own account, a bill
the defendant had received to get discounted or
rn. Instead of which he paid it away. [*Tin-*
J. At the trial my brother *Bompas* objected that
was not the proper form of action, but that it
have been a special action on the case. I think
uld have liberty to raise that objection upon the
ent of this rule, which may go; though at present
no opinion as to the plaintiff's right to have the
t set aside.]

le nisi having been granted,

pas Serjt. (with whom was *G. S. Wilson*) now
l cause. The direction was correct, and the non-
nnot be set aside. It appeared from the me-
lum, that the bill had been delivered to the
ant, to be discounted or returned; and it was in
scounted (*a*) by him. The plaintiff could have
ht to it, unless his right of possession re-
in consequence of a wrongful conversion by
of trust. The real question was, whether
fendant had substantially pursued the course
l out by the memorandum, or whether he was
led by the terms thereof from discounting the
his own use. And, under the circumstances of
e, the nonsuit cannot now be set aside. In *Butler*
nt (*b*) *Lawrence* J. said, "I believe this has never
one, that a counsel shall lie by until he hears the

(*a*) *Vide post*, 594. (*a*). (*b*) 3 *Taunt.* 229.

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opinion of the judge at nisi prius, and that, if he thereupon chooses to be nonsuited, he shall come to the court to set aside his own act." The modern cases do not go quite so far. [*Erskine* J. The distinction seems now to be, that upon a misdirection in point of law, the plaintiff may elect to be nonsuited and afterwards move to set aside the nonsuit; but he cannot do so if the misdirection be upon the facts, such as the expression of a strong opinion on the part of the judge.] In the present case the direction complained of is as to the facts; for if there was not a wrongful conversion, there was no misdirection.

Channell Serjt. (with whom was *Lush*) in support of the rule. No objection is made to the direction upon the facts. The defendant may have had a good defence upon a plea of leave and licence; but he has none upon the present state of the record. The memorandum undoubtedly may mean that the defendant was to have a right to apply the proceeds of the bill to his own use. (*a*) If the plaintiff had demanded the bill of the defendant, he might perhaps have shewn that he had discounted it; but so long as it remained in his hands the property therein remained in the plaintiff, and he might recall it. So, if the defendant did not discount the bill, but converted it to his own use, the right of possession reverted to the plaintiff. The question then is, was there such a conversion here? The defendant applied to *Gaudell* and Co. not to discount the bill, but to get it accepted, and to place it to his account. [*Tindal* C. J. Does not that mean getting it discounted?]

(*a*) This was the construction given to the memorandum by the defendant upon his examination at the former trial. But if the case had stood upon the *memorandum* alone, that document would probably have been understood to mean a discounting by obtaining the amount *in cash*, minus the discount, for the benefit of the plaintiff.

It is submitted that it does not. If it does, the defendant should have pleaded leave and licence. If this application to *Gaudell* and Co. did not amount to a discounting of the bill, there was a wrongful conversion.

TINDAL C. J. When I summed up the case to the jury, I did not look at the precise form of the issues, but I put the case to them in the same manner as it had been put by the counsel, namely, whether there had been a wrongful conversion of the bill by the defendant. It appeared to me then, as it appears to me now, that there had been no conversion at all. The bill was handed to the defendant for the purpose of getting it discounted; and if he could not do so, he was to return it on demand. No demand was made so as to divest the trust reposed in the defendant, till after the bill had been, at least virtually, discounted by him. I am at a loss therefore to see how he can be said to be a wrongdoer. Supposing upon the issue of not guilty, the verdict must have been for the plaintiff, and that a further plea was necessary to let in the evidence, a plea of not possessed, was upon the record. Before I came to the consideration of that plea, I was stopped by the act of the plaintiff in electing to be nonsuited. I meant to have put it to the jury — one way or the other — upon that plea. And I cannot see how the plaintiff could be said to be lawfully possessed of the bill, when he had given it to the defendant to get it discounted, and had not demanded it till after it *had been discounted.* I think, therefore, it would not be justice to the defendant to set aside the nonsuit, when he must have had a verdict upon the plea of not possessed.

COLTMAN J. It has been argued that the plaintiff was entitled to a verdict upon the plea of not possessed, if the bill was not discounted by the defendant according

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to the terms of the memorandum. But I think what took place between him and the Messrs. *Gaudell*, did substantially amount to discounting of the bill by them. At any rate it was evidence for the jury; and this was in substance being left to them by my lord, when the plaintiff elected to be nonsuited. I quite agree that upon the second issue, the defendant ought to have had a verdict. It is not necessary to say how it might be upon the plea of not guilty; but, where a party receives a bill to get it discounted, and does get it discounted accordingly, I am not prepared to say, that that would be even a conversion in fact.

ERSKINE J. I also am of opinion that the point raised by the motion has been answered. It is said that the question left to the jury ought to have been, whether or not there had been a conversion in fact. And if there had been no other plea upon the record than that of not guilty, perhaps the way in which it was put to the jury would not have been quite correct. But there is also the plea of not possessed, which put in issue the plaintiff's right to the bill. Now it appears that the bill had been placed in the hands of the defendant to discount it for his own use. He sends it to a bill-broker with directions to place it to his account. What is the fair meaning of this? In substance it is nothing more or less than a discounting of the bill. The plaintiff could have no right to the possession of the bill unless the defendant had dealt with it improperly. If the defendant had been directed to discount it for the plaintiff, and had in fact paid it away upon his own account, that might have been a conversion in fact; and the same act which proved the conversion by the defendant might revest the right of possession in the plaintiff. But in this case there was no wrongful dealing with the bill. If the defendant dealt

with it in the way he did with the assent of the plaintiff, the latter has no right to recover. It was so left in terms by the Lord Chief Justice; and I entirely agree in the view taken by him. I think the plaintiff has no right to have the nonsuit set aside.

CRESSWELL J. I also am of opinion that this rule must be discharged. The Lord Chief Justice left it as a direction to the jury to find a verdict for the defendant, if they thought he had dealt with the bill in the manner he was authorised to do by the plaintiff; and I think, looking at the state of the record, that the direction was perfectly proper. The plaintiff had parted with the possession of the bill to the defendant for a specific purpose, and had thereby given him a revocable property therein. That put an end to the plaintiff's right of possession to the bill, unless it were used by the defendant in a different way from that in which he was authorised to use it. It appears from the defendant's own statement, made upon oath on the former trial, and which the plaintiff has adopted as his evidence upon this occasion, that the defendant had a demand upon the plaintiff, and that the plaintiff gave him the bill in question, saying in effect, "If you can use this in reduction of your demand, you may;" and the defendant did so. I confess I entertain some doubt, notwithstanding the case of *Stancliffe* v. *Hardwick*, whether in such a state of facts the plaintiff would have been entitled to a verdict even upon the plea of not guilty. Suppose a party delivered a horse to his servant, and directed him to take it to *A. B.* in satisfaction of a demand, and the servant did so; this would be no conversion. The act of the servant would in such a case be consistent with the original right of his master. So here, the disposition of the bill by the defendant was not inconsistent with the plaintiff's previous

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ownership. And it makes no difference whether he was to apply the proceeds to his own debt or to that of a third person.

I wish to add one word as to setting aside nonsuits. The doctrine has perhaps been carried a little too far. I do not accede to the rule, in its broad terms, that, wherever a judge misdirects the jury upon a point of law, and the plaintiff thereupon *elects* to be nonsuited, he can afterwards move to set aside the nonsuit.

Rule discharged.

May 6.

WATTS *v.* JUDD.

The rule as to not granting a new trial on payment of costs, where the trial is by writ of trial, and the verdict is under 5*l.*, applies to a case in which the amount claimed by the plaintiff, by his particulars, exceeds 5*l.*, but is reduced by payment into court, below that sum; although the verdict be for the defendant.

DEBT, for goods sold and delivered, and upon an account stated. The plaintiff, by his particulars, claimed a balance of 6*l.* 10*s.*

Pleas: first, except as to 2*l.* 10*s.*, nunquam indebitatus; secondly, payment into court of 2*l.* 10*s.*

The cause was tried before the undersheriff of *Middlesex*, when a verdict was returned for the defendant.

Dowling Serjt., on a former day in this term, obtained a rule nisi for a new trial, on the ground of the verdict being against the evidence.

Channell Serjt. now shewed cause. The amount in dispute between the parties was only 4*l.*; for, to that sum, the plaintiff's original claim for 6*l.* 10*s.* was cut down by the payment into court of 2*l.* 10*s.* The defendant therefore cannot have a new trial; as the rule that the courts will not grant a new trial, on the ground of the verdict being against evidence, where the verdict is for less than 20*l.*, and the trial has been before a judge

of the superior courts (*a*), is applied to cases under *5l.* upon writs of trial; *Lyddon* v. *Coombes* (*b*), *Fleetwood* v. *Taylor.* (*c*) This rule extends to cases in which the demand has been reduced by a tender; ——— v. *Phillips* (*d*); and must be equally applicable where the demand, as in this case, has been reduced by a plea of payment into court. It also applies where the verdict is for the defendant; *Young* v. *Harris* (*e*), *Lyddon* v. *Coombes.*

Dowling Serjt. in support of the rule. *Young* v. *Harris* is the strongest authority in favour of the defendant; but it is submitted, that where the verdict is for the defendant, the court has no datum to guide it, as in cases where the verdict is for the plaintiff, when the sum assessed by the jury must be taken as the limit of the plaintiff's demand. In *Lyddon* v. *Coombes,* the sum claimed by the plaintiff in his particulars was under *5l.*; here, it is above that sum, and it cannot therefore be said that the sum in dispute was below *5l.* [*Cresswell* J. Can you shew any authority for the position, that where the sum claimed by the particulars is cut down by payments below *5l.*, there can be a new trial on payment of costs? *Coltman* J. You must contend that, notwithstanding the payment of *2l.* 10*s.* into court, the plaintiff could still proceed to recover *6l.* 10*s.* *Tindal* C. J. Is any more than *4l.* in dispute between the parties? The plaintiff's particulars shew that he goes for *6l.* 10*s.* only. The defendant pays *2l.* 10*s.* into court, and says, go on for the rest if you dare. How could the plaintiff re-

(*a*) See *Sewell* v. *Champion,* 3 *B.* & *P.* 627.

(*b*) 5 *Dowl. P. C.* 560.

(*c*) 6 *Dowl. P. C.* 796. See also *Packham* v. *Newman,* 1 *C. M.* & *R.* 584., 5 *Tyrwh.* 215., 3 *Dowl. P. C.* 165.; *Williams* v. *Evans,* 2 *M.* & *W.* 220.

(*d*) 1 *C.* & *M.* 26. *S. C. per nom. Bryan* v. *Phillips,* 3 *Tyrwh.* 181.

(*e*) 2 *C.* & *J.* 14., 2 *Tyrwh.* 167., *Price, P. C.* 136.

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cover more than 4*l.*? *Erskine* J. If you could have shewn that by any possibility the plaintiff could have recovered more than 5*l.*, there might have been something in the argument. But you have shewn the contrary.] Then in a case where the plaintiff was going for 5000*l.*, and the defendant had, by payments, cut down the claim to a sum below 5*l.*, the plaintiff could not have a new trial if the verdict was against evidence.

TINDAL C. J. That the rule of practice as to refusing a new trial, upon the ground of the verdict being against evidence, where the sum in dispute is of a trifling nature, applies equally to cases where the verdict is for the defendant, as where it is for the plaintiff, is shewn by *Young* v. *Harris* and *Haine* v. *Davey*. (*a*) In writs of trial, the amount is limited to a sum below 5*l.* It is insisted, that in this case a larger sum was in dispute between the parties; but I think there was not: and that the rule must be discharged.

COLTMAN J. concurred.

ERSKINE J. Where the verdict is for the plaintiff, the damages are to be taken as the amount of the sum in dispute between the parties. Where the verdict is for the defendant, the amount is to be ascertained by what the plaintiff *could* have recovered. It is clear, that in this case, he could not have recovered 5*l.* The case, therefore, falls within the rule.

CRESSWELL J. concurred.

Rule discharged.

(*a*) 4 *A. & E.* 892., 6 *N. & M.* 356.

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HUNTER *v.* RUSSELL. *May* 6.

If a plaintiff's attorney receives less than the sum indorsed for costs on the writ of summons, the defendant has nevertheless a right to have the sum so received referred to taxation under *R. H.* 2 *W.* 4. *r.* II.

I the 6th of *March* the defendant was served with a copy of a writ of summons, indorsed with a for 7*l.* 7*s.* debt, and 2*l.* for costs. On the 9th he (according to his own statement), to a clerk of the tiff's attorney the sum of 9*l.* 7*s.*, when the clerk ed to return and tendered to him the sum of 2*s.* 6*d.*, ccount of the costs; which the defendant refused to t; and on the same day he took out a summons ve the costs indorsed by the writ of summons . On the 16th of *March* this summons was heard e Lord *Abinger* C. B. at chambers, when some t being raised by contradictory statements, whe- the plaintiff's attorney had received more than s. 6*d.* for costs, the summons was dismissed with , his lordship intimating, that unless the whole nt claimed for costs in the indorsement on the writ paid, the defendant could not have the costs taxed r *R. H.* 2 *W.* 4. *r.* II. (*a*) On the 17th the plaintiff notice to tax the costs of the summons; on the the Lord Chief Baron's order was made a rule ourt; and on the 22d the costs thereof were taxed at

(*a*) By which it is ordered, t upon every bailable writ warrant, and upon the of any process served for payment of any debt, the nt of the debt shall be d, and the amount of what plaintiff's attorney claims he costs of such writ or s, arrest, or copy, and ce and attendance to re- debt and costs; and that *upon payment thereof*, within four days, to the plaintiff or his attorney, further proceedings will be stayed. But the defendant shall be at liberty notwithstanding such payment, to have the costs taxed; and, if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation."

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6*l.* 9*s.* 6*d.*, which was afterwards paid by the defendant, under protest.

Channell Serjt. on a former day in this term (28th of *April*), upon an affidavit of the above facts, obtained a rule calling upon the plaintiff to shew cause why the order of Lord *Abinger* C. B., and the rule of court and the taxation of costs thereon should not be set aside, and the sum of 6*l.* 9*s.* 6*d.* the amount of the costs paid by the defendant to the plaintiff's attorney should not be refunded; and why the costs indorsed upon the writ of summons should not be referred to be taxed; and why, in the event of a sixth being taken off on such taxation, the plaintiff's attorney should not pay the costs of such taxation, and refund to the defendant or his attorney what should appear, upon such taxation, to have been overpaid.

Byles Serjt. now shewed cause, upon an affidavit by the plaintiff's attorney, stating positively that he did not receive more than 9*l.* 4*s.* 6*d.* from the defendant, being only 1*l.* 17*s.* 6*d.* for costs. The application before Lord *Abinger* C. B. was to refer to taxation — not the sum actually paid — but the costs indorsed on the writ, viz. the sum of 2*l.* which had not been paid. The summons therefore was properly dismissed.

Besides the present rule is defective; for it calls upon the plaintiff alone to shew cause why his attorney should not pay the costs of taxation in the event of a sixth being taken off. So that in the event of the rule being made absolute, the attorney might be attached without having been heard.

Channell Serjt. in support of the rule. The object of the general rule is, to enable a defendant to pay the debt and costs within a given time, without incurrin

urther expense. The payment must be made within the ime limited, or the defendant will not have benefit of it; *lowdidge* v. *Slaney*. (*a*) The plaintiff's attorney has o right to demand more costs than he is entitled to. reat mischief would ensue if an attorney might indorse y sum for costs he pleased, and then, by taking 6*d*. s than the sum indorsed, prevent the defendant from ting either the costs claimed or the costs actually id. But this would follow from the construction of e general rule contended for on the other side. [*Erine* J. The argument on the other side seems to be, at the defendant ought to have applied to tax the sum 1*l*. 17*s*. 6*d*. being the sum actually paid. *Cresswell* J. an attorney delivers a bill to his client under the G. 2. *c*. 23., and takes less than the amount thereof, hich is the client to have taxed, the sum claimed, or ie sum paid?] The indorsement on the writ is in the ature of a demand, and the tender by the defendant of ie sum indorsed, is equivalent to a payment; and so he case would fall within the express words of the general rule. Or the conduct of the plaintiff's attorney may be considered as tantamount to his having altered the indorsement from 2*l*. to 1*l*. 17*s*. 6*d*.; and if he had done so in fact, then the summons would have been correct, as the defendant had a right to have that sum taxed. At all events the summons ought not to have been dismissed altogether, even if the order prayed might have been so in part. Then it is said that the present rule asks too much, in calling upon the *plaintiff* to shew cause why the *attorney* should pay the costs of taxation; but notice of the rule must have been given to the attorney, as he has made an affidavit in the matter.

TINDAL C. J. I think it clear upon the affidavits now before the court, that 1*l*. 17*s*. 6*d*. was all that was really

(*a*) 2 *New Ca*. 142., 2 *Scott*, 197., 4 *Dowl. P. C*. 140.

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paid to the plaintiff's attorney. When the case was before Lord *Abinger*, his lordship appears to have conceived a doubt as to the amount actually paid; and to have thought that he had no authority to send the matter to the master to inquire into that fact. The defendant having paid 1*l.* 17*s.* 6*d.* for costs had a right to have that sum taxed; and I think that Lord *Abinger*'s order should be rescinded so far, and that the rule should be made absolute for taxing the sum of 1*l.* 17*s.* 6*d.* the amount of costs paid by the defendant.

Per curiam; Rule absolute accordingly.(*a*)

(*a*) The rule was afterwards drawn up as follows: — "Upon reading, &c. it is ordered, that the rule made in this cause on *Monday* the 20th day of *March* last, and the order of the Right Hon. Lord *Abinger* in the said rule mentioned, and the taxation of costs thereon respectively, be and the same are hereby set aside, and that the sum of 6*l.* 9*s.* 6*d.*, the amount of such costs paid by the said defendant to the plaintiff's attorney, be refunded. And it is further ordered, that the said defendant shall be at liberty, if he shall think fit, to have the costs, amounting to 1*l.* 17*s.* 6*d.*, paid by him to the plaintiff's attorney in this cause taxed, &c. and in the event of a sixth part being disallowed, &c.

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FRYER and Another *v.* SMITH.

May 9.

THE writ of summons in this case was issued on the 16th of *February* 1838, and was indorsed with a claim for "19*l.* 4*s.* 7*d.* debt, with interest thereon at 5*l.* per cent. per annum till paid."

The declaration filed the 19th of *April* following was in assumpsit, and the first count was upon a bill of exchange for 19*l.* 4*s.* 7*d.*, drawn by the plaintiffs upon, and accepted by, the defendant, payable fourteen days after date. There was also a count upon an account stated, for 50*l.* Damages 50*l.*

Pleas: first, to the first count, as to 7*l.* 0*s.* 6*d.*, parcel &c., that at the time of the making and accepting the bill, the defendant was indebted to the plaintiffs in 12*l.* 4*s.* 1*d.*, and no more, and the defendant had before bought of and from the plaintiffs certain goods to the price of 7*l.* 0*s.* 6*d.* on credit for six months, and which had not then expired: and the defendant, at the request, and for the accommodation, of the plaintiffs, had accepted the bill for 19*l.* 4*s.* 7*d.*, being the aggregate amount of the said two sums of 12*l.* 4*s.* 1*d.* and

A writ of summons in assumpsit was indorsed with a claim for "19*l.* 4*s.* 7*d.*, with interest thereon at 5 per cent. till paid." The damages in the declaration were laid at 50*l.* After various pleadings the plaintiffs signed judgment by default for 21*l.* 8*s* 8*d.* Issues in fact were joined upon some of the pleadings, and an issue in law upon part, as to which last

plaintiffs recovered judgment. A writ of trial was issued, directing the sheriff of Kent to try the issues joined, as to assess damages in respect of the judgment *nil dicit* and the judgment on the demurrer. The plaintiffs obtained a verdict for 23*l.* 15*s.* 1*d.*, and having entered a *remittitur* for 3*l.* 15*s.* 1*d.*, signed judgment for 20*l.* and costs.

Held, upon an application to set aside the execution of the writ of trial and all subsequent proceedings for irregularity, that the writ of trial and execution thereof were regular; as it did not appear that the sum sought to be recovered by the plaintiffs exceeded 20*l.*

Held also, that it was no objection to such writ that the sheriff was directed to assess the damages as well as to try the issues.

Held also, that the entry of the *remittitur* cured any irregularity in the verdict.

Semble, that the indorsement on the writ of summons was irregular, and might have been taken advantage of in the first instance.

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7*l.* 0*s.* 6*d.*; and so, that so far as related to the said sum of 7*l.* 0*s.* 6*d.* parcel &c., the defendant had not received nor had the plaintiffs given any consideration &c. Verification.

Secondly, to the first count, as to 5*l.*, further parcel &c., payment of that sum.

Thirdly, to the last count, as to 30*l.* 15*s.* 5*d.* &c. non assumpsit.

Fourthly, to the last count, as to 19*l.* 4*s.* 7*d.*, residue &c., the acceptance of a bill drawn by the plaintiffs for that sum, at fourteen days.

Replication to the first plea, that the plaintiffs did not give consideration for the bill.

To the second plea, a traverse of the payment. And judgment by *nil dicit* as to the sum of 7*l.* 4*s.* 1*d.* in the first count mentioned.

To the third plea *similiter:* and to the fourth plea non-payment of the bill therein mentioned, upon presentment thereof to the defendant when due.

Rejoinder: to the replications to the first and second pleas, *similiter:* and to the replication to the fourth plea, that the last-mentioned bill was not presented to the defendant for payment thereof on the day on which it became due &c. And, after the said bill became due payment of 5*l.* parcel of the money for which the said bill was given &c.

Surrejoinder, traversing the payment of 5*l.* parcel of the sum in the second count mentioned. And judgment taken by *nil dicit* as to the 14*l.* 4*s.* 7*d.* other parcel &c.

Demurrer to the surrejoinder, assigning for causes; that the rejoinder professed to be, and was, pleaded in bar of the whole cause of action comprehended in the said last count; whereas the surrejoinder treated the rejoinder as being in bar only as to the sum of 5*l.* parcel &c., and as if the rejoinder had left the last plea unsupported, and without answer to the replication as

residue of the moneys in the last count men- whereas the rejoinder was an entire answer to lication, and totally supported the last plea; e surrejoinder had thereby worked a discon- e; and that the same was in other respects in- &c. Joinder.

Michaelmas term 1838, judgment was given upon murrer for the plaintiffs; who on the 8th of *Fe-* 1839, obtained an order for a writ of trial. ue was delivered; and notice of trial was given 17th of *May* 1842. The writ of trial, which was he 14th of *June* following and made returnable 16th of *June*, directed the sheriff of *Middlesex* to a jury "as well to try the said issues joined the parties &c., as to inquire what damages d plaintiffs have sustained on occasion of the nt's not performing his promise in the said first nentioned, as to the said sum of 7*l.* 4*s.* 1*d.*, and ect of which the said defendant says nothing", nd also as to the 14*l.* 4*s.* 7*d.*, in respect of udgment by *nil dicit* had been signed; "and inquire what damages the plaintiffs have sus- on occasion of the premises, whereof the said have put themselves upon the judgment of the &c.

trial and assessment of damages took place he undersheriff on the 16th of *June*, when the turned a verdict for the plaintiffs, damages 1*d.* The defendant, on the 24th of *June*, took mmons to set aside the trial, and all subsequent ings, for irregularity. The alleged grounds of gularity were, that the issue was made up in y thereof as a *nisi prius* issue, with the entry of d of *unica taxatio*; which, it was said, was not le to writs of trial, or authorised by the 3 &

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4 *W.* 4. *c.* 42. *s.* 17. (*a*); that the writ of trial did not correspond with the form prescribed by *R. H.* 4 *W.* 4. *r.* 5. in which there is no mention of assessment of damages; that the 3 & 4 *W.* 4. *c.* 42. *s.* 17., did not extend to authorise the assessment of damages, either contingently or otherwise; nor did the judge's order, in this case, which directed the issuing of the writ of trial in the usual form, authorise the issuing of a writ, both to try the issues and to assess damages on the judgment. This summons was heard and dismissed by *Coltman* J. on the 29th of *June*. The plaintiff's costs were taxed on the 26th of *January* 1843 at 33*l.* 17*s.* 6*d.*; on which day (a *remittitur* having been entered for 3*l.* 5*s.* 1*d.*), judgment was signed for 20*l.* damages, and 33*l.* 17*s.* 6*d.* costs.

Bompas Serjt. in last *Hilary* term (*January* 30th), obtained a rule nisi to set aside the execution of the writ of trial, the verdict and the judgment, for irregularity, upon the grounds previously urged.

Channell Serjt. (with whom was *Hindmarsh*), now shewed cause. The application, at any rate, is too late as

(*a*) Which enacts, "that in any action depending in any of the said superior courts, for any debt or demand in which the sum sought to be recovered, and indorsed on the writ of summons, shall not exceed 20*l.* it shall be lawful for the court in which such suit shall be depending, or any judge of any of the said courts, if such court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such court or judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any judge of any court of record for the recovery of debt in such county; and for that purpose a writ shall issue directed to such sheriff, commanding him to try such issue or issues, by a jury to be summoned by him, and to return such writ, with the finding of the jury thereon indorsed, at a day certain, in term or in vacation, to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues."

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regards the execution of the writ of trial and the verdict. If there was any error in the verdict in being for a larger sum than 20*l.* it is cured by the *remittitur*; *Burleigh* v. *Kingdom.* (*a*) The present rule will not open the inquiry, as intended; for it is not sought to set aside the writ of trial. It must be taken therefore as admitted that that was properly issued; and if the writ is correct there is no error or irregularity in the proceedings. The writ of trial was in point of fact perfectly regular. It will probably be contended on the other side, that the plaintiffs sought to recover more than 20*l.*, and therefore that the case is not within the statute. The writ of summons was indorsed for 19*l.* 4*s.* 7*d.* "with interest thereon at five per cent. till paid;" but no date being stated from which the interest was to run, *non constat* that it might have amounted to sufficient to raise the claim to 20*l.* [*Cresswell* J. I think the indorsement must be taken as a claim for interest from the issuing of the writ of summons to the time of payment.] It will also be contended, that although the court, under the statute, may order the *issue joined* to be tried, no power is thereby given them, to order the assessment of damages. But it was not necessary to give them that power, as it existed by the old practice, whenever there was judgment by default. It would be very inconvenient to send two writs to the sheriff in the same cause, one to try the issues, and the other to assess the damages. In *Tidd's Pract. Forms* (*b*), there is a form of a writ of trial, directing the sheriff also to assess damages upon issues in law. And if they may be assessed contingently where judgment has not been given, they may be assessed absolutely where judgment has been given. If the matter is at all doubtful, the court will not interfere, but will leave the defendant to his writ of error.

(*a*) 2 *Dowl. P. C.* 351. (*b*) Page 295., 8th ed.

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In *Walker* v. *Needham* (*a*), where an application was made to set aside a writ of trial in *detinue*, upon the ground that that action was not within the statute, *Tindal* C. J. said "This is, in substance, a motion, in arrest of judgment; and we think that we ought not to be called upon to arrest the judgment where the question is one of nicety and difficulty, and appears on the record. Still less should we be so called upon, where the defendant, who now complains that the writ has been improperly issued, was himself a consenting party to the case going before the sheriff." Those reasons apply strongly to this case.

Sir *T. Wilde* and *Bompas* Serjts. in support of the rule. The objection taken is not to the writ of trial itself, but to its improper execution. In *Jacquot* v. *Boura* (*b*) which was an action for wages, the amount indorsed upon the writ was 12*l.* 19*s.*; but it appearing that the plaintiff had been engaged at a yearly salary and dismissed without notice, it was held that the case was not triable before the sheriff. *Parke* B. in delivering the judgment observed that "the amount to be recovered might be limited to 20*l*; but, on the other hand, it might not; it would depend on the circumstances proved in the case: therefore it is a claim for unliquidated damages and not within the act. It might as well be said that an action against a carrier for negligence was within the act, where the damages are under 20*l.*, because they could not be more. The probable limit of the damages on one side does not prevent its being a claim for unliquidated damages." Here there is a claim for interest, which *may* raise the sum to be recovered to more than 20*l.* It is submitted that the claim would be for interest from the time when the bill was due up to final judg-

(*a*) *Antè*, Vol. III. 557., nom. *Jacquet* v. *Bower*, 7 *Dowl. P. C.* 331.
(*b*) 5 *M. & W.* 155. *S. C.*

ment. It makes no difference in principle whether the excess was for 3*l.* or for 300*l.* The court may surmise how much was given for interest, but they cannot judicially know it. Even assuming, therefore, that the writ of trial was properly issued it has been improperly executed. The *remittitur* cannot have the effect of giving jurisdiction if there was none originally. [*Cresswell* J. Do you mean to argue that if the writ of trial was sufficient to give jurisdiction, and the jury found a verdict for more than 20*l.* that would make the writ wrong?] The *execution* of the writ would be wrong. But here, the writ of trial itself did not follow the writ of summons. The forms inserted in the appendix to the rules of court *Hil.* 4. *W.* 4. are of the same validity and effect as if they were given by statute; the form of the writ of trial (*a*) is confined to the *trial of issues.* Any supposed inconvenience as to sending two writs to the sheriff at the same time, is no sufficient reason for departing from the form, and framing a writ, as here, in a new manner. The form in *Tidd* referred to, has never been judicially recognised.

TINDAL C. J. Two objections have been raised in this case, to neither of which do I feel disposed to yield. The claim indorsed on the writ of summons was for a debt of 19*l.* 4*s.* 7*d.* with interest thereon, not stating from what period the interest was to be calculated. I agree that if the defendant had come in the first instance to complain of this uncertainty and had asked us to set aside the writ for irregularity, we might have acceded to his application. But I do not see why we are called upon now to say that the plaintiffs sought to recover more than 20*l.* At any rate the ground of objection is on the record. The second objection is

(*a*) No. 5.

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that the entry of *unica taxatio* should not have been added to the writ of trial. But would be very inconvenient if it might not be so added, and I am not aware of any positive rule of law that forbids it. However, this objection also is on the record. The forms promulgated with the new rules are headed with a direction that "the issues, &c. shall be in the several forms in the schedule hereunto annexed, *or to the like effect, mutatis mutandis.*" And I think the *effect* of the form has not been so departed from in this case as to vitiate the writ of trial. It is a great convenience to both parties that the trial of the issues and the assessment of damages should take place at the same time. For these reasons I think this rule must be discharged.

COLTMAN J. I also think that the indorsement on the writ of summons was at most a mere irregularity which should have been taken advantage of in the first instance. The question now is, can we see that more than 20*l.* was sought to be recovered by the plaintiffs? The only certain sum that is sought to be recovered is 19*l.* 4*s.* 7*d.*; there are no particulars of demand before us to show that more than 20*l* was demanded; and the writ of trial recites "that the sum sought to be recovered, and indorsed in the writ of summons herein does not exceed the sum of 20*l.*" I cannot see therefore that this was a case in which the court were not justified in issuing a writ of trial in the usual way. Upon the second point I agree with my lord that there is no objection, in principle, to uniting in one writ a direction to the sheriff to try the issues and to assess the damages. It seems to me that the forms appended to the new rules are not peremptory, but are to be adapted to the exigencies of each case, *mutatis mutandis.*

ERSKINE J. I am of the same opinion. The indorsement upon the writ of summons does not show that

a greater sum than 20*l.* is sought to be recovered. And there is nothing in the rules of *Hil.* 4 *W.* 4. that forbids the directing of an assessment of damages in a writ of trial. But these objections being on the record, the defendant can avail himself of them, if so advised, by writ of error. As to the objection that the jury have given a verdict for a larger sum than 20*l.*, that is cured by the entry of the *remittitur damna* as to the excess.

CRESSWELL J. concurred.

Rule discharged.

ROSE *v.* GROVES and Another.

May 10.

CASE. The first count of the declaration stated, that, before and at the time &c. the plaintiff was and lawfully carried on the business of an innkeeper and licensed victualler in a certain house commonly called &c., and therefrom derived great gains and profits by supplying refreshments to persons coming to and frequenting the said house, which said house abutted on one side thereof upon a certain navigable river, to wit, the river *Thames*, and was and of right ought to have upon the said river, and kept there for a long space of time, to wit, *from thence hitherto*, certain timbers, so as to drift opposite to the plaintiff's house; whereby the access thereto was obstructed, and divers persons who would otherwise have come to the house and taken refreshments there, were prevented from so doing. Plea, not guilty.

Case. The declaration stated that the plaintiff was possessed of a public-house abutting upon a navigable river, and that the defendant wrongfully and maliciously placed

Held, upon motion for a new trial for misdirection, that it was not a question for the jury whether the plaintiff had sustained any special damage.

Semble, upon motion in arrest of judgment, that the declaration did not allege any *public* nuisance; and

Held, that, at any rate, it disclosed a private injury to the plaintiff.

Held also, that the allegation that the grievance had continued *hitherto* was immaterial.

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been during all the time aforesaid accessible from the said river to persons navigating thereon in boats and other craft; all which the defendants at the time &c. well knew: yet the defendants, contriving and intending to injure the plaintiff, and to hinder and prevent persons from coming by way of the said river to the plaintiff's said house for the purpose of taking refreshments there; theretofore, to wit, on &c. and on divers other days &c., wrongfully and maliciously put and placed in and upon divers parts of the said river near to the plaintiff's said house, and wrongfully and maliciously kept and continued there for a long space of time, to wit, *from thence hitherto*, divers large beams, spars and other materials, in order that the same might, and the same during all the time aforesaid did, at certain states of the tide, to wit, at high-water, for a long space of time, to wit, for two hours next before and after high-water, drift and float opposite to and against, and at the several times last aforesaid continued floating opposite to and against the said house of the defendant, and thereby the way and access from the said river thereto was, during all the time aforesaid, hindered and obstructed, and divers persons who would otherwise have come to the said house of the plaintiff and taken refreshments there, were thereby during the time aforesaid, hindered and prevented from so doing.

The second count was for stopping up and obstructing a footway leading to the plaintiff's public-house. And the third count stated that the defendants wrongfully and maliciously placed themselves in a certain highway near to the said house of the plaintiff, and intercepted divers persons on their way to the plaintiff's house for the purpose of taking refreshments there, and by falsely representing that the plaintiff's house was disreputable, and that nothing good was sold at or to be obtained there, persuaded the said persons and they

hen were thereby prevented, and did desist, from com- ng to the house of or dealing with the said plaintiff. This count concluded with an allegation of special lamage in the refusal of certain persons to continue their lealings with the plaintiff.

Plea: not guilty.

At the trial before *Maule* J. at the second sittings for *London* in this term, the following facts appeared in evidence:—The plaintiff was the occupier of the public ouse in question, which was situated at *Bermondsey*, nd communicated to the river *Thames* by a passage nd steps, where persons frequenting the plaintiff's ouse were accustomed to land from boats. The de- endants, who were mast and block makers, occupied he adjoining premises, and evidence was adduced to hew that they had placed certain timbers and spars in he river in such a manner that at high-water the access o the plaintiff's house was obstructed. It was shewn hat the plaintiff's business had fallen off since the al- eged obstruction. No evidence was given in support f the second and third count.

The learned judge left it to the jury to say whether he access to the plaintiff's house had been obstructed n fact; and if so, whether the obstruction had been aused by the *accidental* floating of the timber across the laintiff's landing-place; and directed them in that case o find a verdict for the defendants; the plaintiff's ounsel having disclaimed damages if the jury should hink the obstruction were accidental.

The jury found a verdict for the plaintiff, damages 20*l.*

Bompas Serjt. now moved to arrest the judgment, or or a new trial upon the ground of misdirection. [*Cress- ell* J. You must take the question as to the new trial irst in order; for a motion in arrest of judgment as-

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sumes the verdict to be good. *Tindal* C. J. A motion for a new trial cannot be made after a motion in arrest of judgment; *Turbervil* v. *Stamp.* (*a*) You must shape your rule for a new trial *or* for arrest of judgment.]

The ground of misdirection is, that the learned judge omitted to leave it to the jury to say whether any *special* damage had been proved. [*Maule* J. No *special* damage is alleged. If the plaintiff had alleged that *J. Smith* was prevented from coming to the public-house, that would have been *special* damage. But a statement that *every body* was prevented from coming is a statement of *general* damage. *Cresswell* J. It is not necessary to prove *special* damage in this action. It is sufficient to prove *particular* damage. In *Iveson* v. *Moore* (*b*) it was held that the preventing of colliers from coming to a colliery by obstructing a public highway, *per quod* the benefit of the colliery was lost, was such a damage as would enable a man to maintain an action for the nuisance.] A party complaining of the obstruction of a public highway—and a public navigable river is the same thing—must shew some *special* damage; for the inconvenience in such a case is *general*; *Hubert* v. *Groves* (*c*), *Fineux* v. *Hovenden.* (*d*) [*Maule* J. This is not an action for obstructing the river, but for obstructing the access to the plaintiff's house.] There is no allegation of injury to the plaintiff's house. [*Tindal* C. J. There is an allegation of injury to the plaintiff.] The damage as laid in the declaration is rather a damage to the individual customers, who might have a fancy for the particular beer sold at the plaintiff's house, or who might have been able to get credit there. Possibly *they* might have

(*a*) 2 *Salk.* 647. See also *Philpot* v. *Page*, 4 *B.* & *C.* 160., 6 *D.* & *R.* 281.

(*b*) 1 *Ld. Raym.* 486., 1 *Salk.* 15., *Lord Holt*, 10., *Carth.* 451., 12 *Mod.* 262., *Com.* 58., *Comb.* 480.

(*c*) 1 *Esp. N. P. C.* 148.

(*d*) *Cro. Eliz.* 664.

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ıined an action; *Russell* v. *The Men of Devon* (*a*); ıe plaintiff, unless he has sustained some special ;e, is not entitled to bring an action for that which, offence at all, amounts to a public nuisance. *al* C. J. There is nothing on the face of this de- on that at all shews a nuisance to the river. *Er-* J. The defendants had a right to float their on a navigable river. *Maule* J. The only plea guilty; which denies the alleged obstruction of ıy from the river to the plaintiff's house.] It is in the declaration that the defendants wrongfully *ıaliciously* placed the spars &c. upon the river. octrine that an action will not lie at the suit of an lual for an obstruction in a public highway unless ıtain a *special* damage, is supported by *Chichester !hbridge.* (*b*) [*Tindal* C. J. This question was liscussed in *Wilkes* v. *The Hungerford Market ıy.* (*c*) One objection taken in that case was that ury of which the plaintiff complained, in stopping :reet, was an injury to the public at large, and was ɔre the subject of an indictment, and not of an ; but this court thought otherwise, as a distinct was shewn to have been done to the plaintiff. ıe J. In a note to *Chichester* v. *Lethbridge* (*d*), the ıs of the judgment in *Iveson* v. *Moore* are given a MS. note of *Willes* C. J. as follows: — "The ı the judges went upon was principally this, that it ently appeared that the plaintiff must and did ne- ily suffer a special damage more than the rest of ing's subjects by the obstruction of this way; be- it was set forth that the only way to come to the its from one part of the county was through this

(*a*) 2 *T. R.* 667.
(*b*) *Willes*, 71.
(*c*) 2 *New Ca.* 281., 2 *Scott*,
(*d*) *Willes*, 74 *a.*

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way, by which it must be understood, without any allegation of loss of customers, that the plaintiff did suffer particularly in respect to his trade by the plaintiff's wrong."] In that case *special* damage to the plaintiff was alleged. [*Erskine* J. *Particular* damage was alleged, and that is alleged here.] But it is not set out with sufficient particularity; nor is the injury of which the plaintiff complains, direct and immediate, as in *Greasley* v. *Codling*. (*a*) *Malachy* v. *Soper* (*b*) is an authority to shew that special damage must be particularly alleged. That was an action for slander of title (which in respect of alleging damage, stands upon the same footing as the present action), and it was held not to be maintainable without an allegation of special damage. The declaration there alleged that by the publication of a paragraph in a newspaper relating to shares in a certain mine, "the plaintiff was injured in his rights, and the shares possessed by him and in which he was interested, had been and were much depreciated and lessened in value; and divers persons had believed and still did believe that he had little or no right to the shares, and that the mine could not be lawfully worked or used for his benefit; and that he had been hindered and prevented from selling or disposing of his said shares in the mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done, and was prevented from gaining divers profits which would otherwise have accrued to him;" and this was held not to be a sufficient allegation of special damage. That case shews also that *particular* damage and *special* damage are used synonymously. [*Cresswell* J. In an action for slandering a man in his trade, where the declaration alleges that he thereby lost his trade, he may shew a *general* damage done to his trade; though he

(*a*) 2 *Bingh.* 263., 9 *J. B. Moore*, 489.

(*b*) 3 *New Ca.* 371., 3 *Scott*, 723.

cannot give evidence of *particular* instances. So here, may not the plaintiff shew a general damage to his trade? That *general* damage may be considered as *special* or *particular* to him, as being *ultra* to that suffered by the rest of the world. In *Iveson* v. *Moore* it appeared there was only one way to the coalpit. [*Cresswell* J. That is from one part of the county. *Tindal* C. J. So here, the house was only accessible from the *Thames* by the passage which the defendants obstructed.] No unlawful act is stated in this declaration, unless it is taken to contain an allegation that the act was done with an intention to injure the plaintiff. In *Wilkes* v. *The Hungerford Market Company* an unlawful act was stated; for it was alleged that the defendants kept the way stopped up for an unreasonable time; there is no such allegation here. [*Cresswell* J. There is an allegation that the defendants put the spars upon the river in order that the same might drift and float opposite to and against the house of the plaintiff.] That is an averment of intentional damage to the plaintiff, which is the only cause of action laid in the declaration; and that question was not left directly to the jury. The only question substantially left was whether the way was obstructed in fact. [*Maule* J. There was evidence that customers could not get to the house.] But there was no evidence of any *intentional* injury to the plaintiff.

There is another objection to the declaration. It states that the defendants kept the beams and spars upon the river "for a long space of time, to wit, from thence hitherto" that is, up to the time of the declaration; and up to that time therefore the damages must be presumed to be given. [*Maule* J. It is laid under a *videlicet*. If it had said that the obstruction had been continued "for a long space of time, to wit, for three centuries," there could have been no objection to it.]

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TINDAL C. J. I think the declaration in this case is free from the objections that have been urged against it. A private right is set up on the part of the plaintiff; and to that he complains an injury has been done. The declaration states that the plaintiff carried on the business of an innkeeper in a house which abutted upon a certain navigable river, and was and of right ought to have been accessible from the said river to persons navigating thereon in boats and other craft. There is no traverse of the right so alleged on the part of the plaintiff. The declaration goes on to say that the defendants wrongfully and maliciously put and placed in and upon divers parts of the said river near to the plaintiff's house, and wrongfully and maliciously kept and continued there for a long space of time, divers large beams, spars and other materials, in order that the same might, and the same during all the time aforesaid did, drift and float opposite to and against the plaintiff's house, and thereby the way and access from the river thereto was, during all the time aforesaid, hindered and obstructed. But it is not stated that the place where the beams and spars were placed or drifted was part of a public highway or of the navigable river. They might drift close to a bank where the water was so shallow that no boat could go there; and that would not be a public nuisance. It appears to me, therefore, that the plaintiff is not complaining of any public injury. But even if he were, I think, after the cases that have been cited, that he discloses a sufficient cause of action. I cannot distinguish the present case from *Iveson* v. *Moore* and *Wilkes* v. *The Hungerford Market Company*; nor from *Rose* v. *Miles* (*a*), where the declaration stated that before and at the time of committing the grievance, the plaintiff was navigating his barges laden with goods and

(*a*) 4 *M.* & *S.* 101.

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gable creek, and that the defendants wrongfully red a barge across and kept the same so moored, thereby obstructed the public navigable creek, and ented the plaintiff from navigating his barges so n; *per quod* the plaintiff was obliged to convey his ls a great distance over land, and was put to trouble the expense of the carriage of his goods over land.

same objection was taken there as in this case, ely, that the obstruction was in the nature of a mon nuisance, and was not a particular injury to plaintiff; and that he had not shewn any special age resulting to him from the alleged grievance. this court held that there was such a special damage wn for which an action would lie; and their judgt was confirmed by a court of error. After these es I do not see here how we can arrest the judgment n that ground. The other point has received a ficient answer. And they are both upon the record; that the defendants, if so minded, may have their t of error.

With regard to the new trial, I think that the defends, if they meant to make any point as to the only stion for the jury being whether the act were done ntionally, ought to have raised it when the judge was ming up.

ERSKINE J. I am of the same opinion. It is said t the learned judge ought to have left the question, ether the plaintiff had sustained any *special* damage. t the count under consideration does not contain any gation of special damage in the usual sense of the m. The only question in the case was, whether there s any injury to the plaintiff by the obstruction of access to his house; and that must have been the asure of damages, which the jury took into their coneration. There is no ground therefore for a new trial.

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As to the arrest of judgment the declaration shews, in the language of *Iveson* v. *Moore*, that the plaintiff had sustained a damage more than the rest of the Queen's subjects; and that may, in one sense, be termed a damage *special* or peculiar to the plaintiff. To support that allegation it was not necessary to aver the loss of any particular customers. Upon both grounds, therefore, the application fails.

MAULE J. I think the declaration is perfectly good. It states in substance that the defendant had placed timber upon the river in such a manner as to prevent customers coming to the plaintiff's house. That is an injury to the plaintiff with which the public have nothing whatever to do. And supposing that the declaration did allege a nuisance to a public highway, still there is a clear statement of a private injury to the individual complaining: but I think no public injury is alleged. There is not much probability of a writ of error being brought, if the rule now moved for is refused; but a great certainty of it if the rule were granted. The defendants by pleading not guilty only, have merely denied that they stopped the way in question; but it was proved that they had done so. With regard to the amount of damages, the plaintiff shewed that he had lost custom by reason of the obstruction. I told the j not to find for the plaintiff if they were of opinion the timber had broken loose and drifted before plaintiff's house by accident — the plaintiff not a for damages if the obstruction were accidental — t perhaps even if the obstruction had been of the racter, he might have been entitled to a verdict.

CRESSWELL J. I am of the same opinion. T tion in issue was, I think, properly left to t and, therefore, there is no ground for distur verdict.

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he arrest of judgment, it seems to me the declar-
closes a sufficient cause of action in the plain-
ther the obstruction complained of was a nuis-
he highway or not. *Iveson* v. *Moore* is hardly
shable from the present case, except that there
tion was taken to the declaration which does
here. In that case *Holt* C. J. observes, "Though
that the plaintiff lost his customers &c., that
ecial enough; but it ought to be shewn that
s were coming to buy and were obstructed,
" &c. The declaration was nevertheless held
. In the present case the declaration expressly
at divers persons, who would otherwise have
the plaintiff's house and taken refreshments
re by reason of the obstruction caused by the
ts prevented from so doing. *Iveson* v. *Moore*
ore a direct authority in favour of the present

Rule refused.

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May 10.

EDWARDS *v.* TOWELS.

In an action for boarding and lodging the defendant's wife, it appeared, they were living apart, but the circumstances of their separation were not explained. A letter from the plaintiff's attorney to the defendant, written during the time the wife was living in the plaintiff's house, was put in evidence, informing the defendant that she was getting into debt and was anxious to return to him. To this the defendant returned no answer. The jury were directed to say whether the defendant thereby authorised the wife to contract for necessaries. Held, a misdirection.

ASSUMPSIT for the use and occupation of certain rooms by the defendant's wife, and for goods sold and delivered; with a count upon an account stated. Plea: non assumpsit.

The cause was tried before the under-sheriff of *Middlesex*, when the following facts appeared in evidence. The defendant was married in *May* 1839. On the 28th of *December* 1840, his wife went to the house of the plaintiff (whose wife was her aunt) to board and lodge, and remained there till the 28th of *February* 1841. During this time she was living apart from her husband; but the cause or circumstances of the separation did not appear. In *January* 1841, the plaintiff's attorney sent to the defendant the following letter: —

"30th *December* 1840.

"Sir, — I have this morning had communication with the friends of your wife; and my instructions are, to apprise you that she has been endeavouring to support herself, but that for some time past she has not been able to do so; consequently she is now getting fast into debt. You must be aware that you are liable for all debts for necessaries that she may contract. I am further instructed to inform you that she is willing and anxious to return to you. Should you decline her doing so, I am authorised to negotiate with you for an allowance to her for support. I am sure that, as a man, you will see the necessity of this. You were the means of depriving her of a comfortable situation, which I understand she had before marriage with you. Unless, then

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I hear from you satisfactorily by *Friday* next, I st adopt those measures which will compel the same, put you to considerable expense in the end.

"Signed," &c.

ddressed to the defendant "at Mrs. *Whiting's, Lark Lane, Clapham.*"

he letter was received and read by the defendant in presence of Mrs. *Whiting*, who said at the time— is no use Mrs. *Towels* sending a lawyer's letter to as she will get nothing out of him." The defend- himself said nothing, and returned no answer to the er.

he defendant's counsel applied for a nonsuit, upon ground that, in the absence of any proof of the cir- nstances under which the defendant and his wife were arated, the latter had no implied authority to bind her band. Leave being reserved to the defendant to move on this point, the undersheriff left it to the jury to whether the defendant, by not taking notice of the ter, had impliedly authorised his wife to charge him h necessaries. The jury returned a verdict for the intiff, damages 4*l.* 16*s.*

Byles Serjt., on a former day in this term (*April* 25th), tained a rule nisi to enter a nonsuit pursuant to the ve reserved, or for a new trial, on the ground of mis- rection. Upon the former point he cited *Mainwaring Leslie* (*a*) and *Clifford* v. *Laton.* (*b*)

Bompas Serjt. (with whom was *Wordsworth*) now shewed use. There was some evidence in the case to support e verdict; for the letter sent to the defendant, con- ned an offer on the part of his wife to return to him,

(*a*) *Moo. & Malk.* 18., 2 *C. P.* 507. (*b*) *Moo. & Malk.* 101.

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which the defendant, by his conduct, must be taken to have declined. And if a husband refuses to receive his wife into his house, it is the same as if he turns her out of doors; in which case she must have credit for her reasonable expenses; *Rawlyns* v. *Vandyke.* (*a*) It was not necessary that the wife should make a formal tender of herself to her husband; it was sufficient that she was "willing and anxious" to return to him. The defendant, though it does not appear that he made any statement himself, did not repudiate that made by Mrs. *Whiting* in his presence — that his wife would get nothing out of him. [*Cresswell* J. That is hardly evidence that he refused to take her back.] At any rate, he did not take her back in fact. And it will not be assumed that the separation was owing to any misconduct on her part. The real question in the case was, whether the defendant had, by his conduct, authorised his wife to contract for necessaries; and that was the question which was substantially left to the jury.

Byles Serjt. (with whom was *Udall*), in support of the rule. Independently of the letter the case would have been simply that of a husband and wife living apart, the cause of their separation being unknown. In *Mainwaring* v. *Leslie*, *Abbott* C. J. distinctly lays down the rule that "when the wife is not living with her husband, there is no presumption that she has authority to bind him even for necessaries suitable to her degree in life: it is for the plaintiff to shew that, under the circumstances of the separation, or from the conduct of the husband, she had such authority." The plaintiff, therefore, was in this case bound to shew the circumstances of the separation. [*Tindal* C. J. Not the particular circumstances; no tradesman could

(*a*) 3 *Esp. N. P. C.* 250.

know them.] He ought, at any rate, to have shewn some of them. Then the question is, what is the effect of the letter. It does not purport to be written by the wife's authority; but appears to have been written in consequence of communications with her friends. There is no offer to return made by her. Even suppose there had been, the defendant might have had grounds for refusing to receive her. It is said that misconduct is not to be presumed against the wife; neither is it to be presumed against the husband. There is to be no presumption either way. But if a married woman choose to leave her husband and live apart from him, he is not bound to maintain her. There is no evidence that the defendant refused to receive her back. What was said by Mrs. *Whiting* appears to have reference to the demand for an allowance, and not to her return. [*Tindal* C. J. The defendant does not answer the letter. Surely he would have said something if he had meant his wife to come back. I think his silence speaks more loudly than what the woman said. It is very slight evidence certainly; but it is some.] The contract, if any existed, had begun before the letter was written.

TINDAL C. J. I think that the direction of the undersheriff was, perhaps, not pointed enough for the jury to understand its bearing; and that the case should go down for a new trial upon the ground of misdirection.

Per curiam;

Rule absolute.

May 10.

GREENWOOD *v.* ROTHWELL.

Devise of realty to *A.* "for and during the natural life of the said *A.*; and from and after his decease unto all and every the issue of the body of *A.*, share and share alike, as tenants in common, and the heirs of such issue:"

Held, that *A.* took an estate for life only.

THE following case was, by order of Lord *Langdale* Master of the Rolls, bearing date the 22d of *November*, 1842, submitted for the opinion of this court:—

John Mitchell, late of *Clayton*, in the parish of *Bradford*, in the county of *York*, yeoman, deceased, being at the date and execution of his will hereinafter mentioned, and thence until and at the time of his decease, seised of certain lands and hereditaments situate at *Clayton*, in fee-simple, made and published his last will and testament in writing, duly executed and attested as then by law required for the devise of freehold estates, and bearing date the 6th of *September*, 1841, whereby, after certain other devises and bequests, he gave and devised the said hereditaments in the words following: —

"And I also give and devise unto *Jonas Greenwood*, the son of my late brother-in-law *Joseph Greenwood*, all my lands and hereditaments situate in *Clayton* aforesaid, and now in the occupation of *John Mortimer*, and also all other my messuages, cottages, lands and tenements situate in *Clayton* aforesaid, for and during the natural life of the said *Jonas Greenwood*; and from and after his decease, I give and devise the same premises, unto all and every the issue of the body of the said *Jonas Greenwood* share and share alike, as tenants in common, and the heirs of such issue."

The testator died without having revoked or altered his said will.

The said *Jonas Greenwood* thereupon became seised of the said devised premises as devisee thereof under the said will; and by indentures of lease and release, bearing

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ate the 13th and 14th of *March*, 1823, conveyed these remises to *Abraham Tempest*, his heirs and assigns, and, ı pursuance of a covenant for the purpose contained in ıe said indenture of release, levied a fine *sur conusance e droit come ceo, &c.*, with proclamations, to the said *braham Tempest* and his heirs, of the said premises.

The defendants claimed under the said *Abraham empest.*

The said *Jonas Greenwood* died leaving children.

The plaintiffs, as the surviving children, and as the eir-at-law of one of them deceased, claimed the preises under the will.

The question for the opinion of the court is, what tate did *Jonas Greenwood* take in the devised premises ıder the will?

The court and parties to be at liberty to refer to any her parts of the will on the argument of the case. (*a*)

The case was argued on *Wednesday*, the 10th of *lay.*

Byles Serjt. (with whom was *J. Turner*) for the plainfs. *Jonas Greenwood*, the devisee, took an estate for e only. The words "issue of the body" in the devise e words of *purchase* and not of *limitation*; and the aintiffs, as the children of the tenant for life, take the e as tenants in common in remainder. This construcon, which there is no rule of law to defeat, effectuates e plain intention of the testator who expressly devises e estate to *Jonas*, for and during his natural life. his shews the termination of *his* estate, and the follow g word: "from and after his decease" shew the comencement of another estate. The defendants will ntend that the devisee took an estate tail, and applying

(*a*) The other parts of the will threw no light on the devise question.

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the rule in *Shelley's* case (*a*), they will make the words, "for and during the natural life of the said *Jonas Greenwood*" of no avail; they must also expunge the words, "share and share alike as tenants in common, and *the heirs of such issue.*" The latter words would be superfluous or repugnant if an estate tail had been previously given. They were intended to dispose of the whole estate, which it was the manifest intention of the testator to do; but the construction contended for on the other side would leave the fee undisposed of. In order to give a meaning to the words, "all and every the issue," the defendants must adopt the doctrine of *cy près*, and contend that they must mean "all and every the issue *successively.*" There is no case in which the word "issue" has been held to be a word of limitation, where, as in this case, there were also words of division and distribution — such as, "share and share alike, as tenants in common"—or superadded words of limitation—as "heirs of such issue"—or, where there was no limitation over. The devise over is to the "issue of the body" of *J. G.*, not to the "heirs of the body," which *primâ facie* are words of limitation; nor to the "children," which is a word of purchase. "Issue of the body" is an intermediate expression which may be interpreted either way, so as best to carry out the intention of the testator. *Lees* v. *Mosley* (*b*), and the cases there cited of *Hockley* v. *Mawbey* (*c*), *Doe dem. Cole* v. *Goldsmith* (*d*), and *Loddington* v. *Kime* (*e*), are distinct authorities to shew this flexible quality of the word "issue." Even if the words had been "heirs" (instead of issue) "of the body" still the devisee would have taken only an estate for

(*a*) 1 *Co. Rep.* 88. 93.
(*b*) 1 *Younge & Col.* 589.
(*c*) 1 *Ves.* jun. 143., 3 *Bro. C. C.* 82.
(*d*) 7 *Taunt.* 209., 2 *Marsh.* 517.
(*e*) 1 *Salk.* 224., 1 *Lord Raym.* 203.

, according to *Doe dem. Long* v. *Laming* (*a*); which s never been overruled, though its authority is cer- ily doubted in *Jarman on Wills.* (*b*) But the present e is much stronger. *Jesson* v. *Wright* (*c*), and *Doe* . *Bosnall* v. *Harvey* (*d*), will be relied upon for the ndants, as shewing that words of distribution are sufficient to defeat the rule in *Shelley's* case; but in former case the devise over was to the "heirs of the ly" of the first devisee; and in both cases there re no words of superadded limitation, and there were nitations over. The presence or absence of a limitation ver has always been considered material as assisting n the construction of a will. And it is reasonable that it should be so. If the testator limits over, it is strong to shew that he intended to give only an estate-tail. If he does not it is equally strong to shew that he intended to give the whole estate. If the words at the end of the present devise had been "the heirs of the body of such issue," instead of simply "the heirs of such issue;" some difficulty might have arisen, as the plaintiffs then must have asked the court to imply cross remainders.

Channell Serjt. (with whom was *W. Rogers*) for the defendants. The first devisee took an estate-tail. It is impossible to give effect to all the words in the devise. Some are repugnant and others inoperative. The words "issue of the body" must be taken as *nomen collectivum*. *Primâ facie* they import an estate tail; and, as observed by *Thurlow* C. in *Hockley* v. *Mawbey*, they are perhaps the aptest which can be used to introduce such estate. The testator here does not devise to his relations by

(*a*) 2 *Burr.* 1100.
(*b*) Page 287.
(*c*) 2 *Bligh*, 1., overruling *Doe dem. Wright* v. *Jesson*, 5 *M. & S.* 95.
(*d*) 4 *B. & C.* 610., *per nom Bagnall* v. *Harvey*, 7 *D. & R.* 78.

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blood. His object is to benefit *Jonas Greenwood*, and his issue, and that the estate should revert to his own right heirs, but not till the failure of such issue. The word "issue" is to be taken in an indefinite sense, as a word of limitation; for if *Jonas Greenwood* took only an estate for life, and had children, who had issue, and the children died during the life of the testator, the grandchildren would take nothing, as they could only take by way of remainder, and the estate would have lapsed; but according to the construction contended for on the part of the defendants, the grandchildren would take an estate-tail. [*Maule* J. According to your view, the same construction would follow if *Jonas Greenwood* died, living the testator, when the whole estate would lapse.] The argument is only intended to shew that the object of the testator was, to benefit the *issue* indefinitely, and not the children merely. The ground of the decision in *Hockley* v. *Mawbey* was, that there was a power of appointment to distribute the shares, shewing that the objects of his bounty were not intended to take as tenants in tail, but in fee. *Doe dem. Cole* v. *Goldsmith* turned upon a similar point. *Doe dem. Long* v. *Laming* is inconsistent with the more recent authorities of *Doe dem. Bosnall* v. *Harvey*, and *Jesson* v. *Wright*. But even assuming it not to be so, the peculiar language of the will in that case will prevent the application of the decision as a general principle. *Goodright dem. Lisle* v. *Pullyn* (*a*), *Wright* v. *Pearson* (*b*), *Denn dem. Geering* v. *Shenton* (*c*), *Roe dem. Dodson* v. *Grew* (*d*), *Doe dem. Blandford* v. *Applin* (*e*), *Denn dem. Webb* v. *Puckey* (*g*), *Frank* v. *Stovin* (*h*), *Mogg* v. *Mogg* (*i*), *Ward* v. *Bevil* (*k*),

(*a*) 2 *Ld. Raym.* 1437., 2 *Stra.* 729.
(*b*) 1 *Eden*, 119., *Ambl.* 358.
(*c*) *Cowp.* 410.
(*d*) 2 *Wils.* 322., *Wilmot*, 272.
(*e*) 4 *T. R.* 82.
(*g*) 5 *T. R.* 299.
(*h*) 3 *East*, 548.
(*i*) 1 *Meriv.* 654.
(*k*) 1 *Y. & J.* 512.

and more particularly *Tate* v. *Clark* (*a*), are authorities for the defendants. *Loddington* v. *Kime* is not reconcilable with *King* v. *Burchell.* (*b*)

Byles Serjt. in reply. *Tate* v. *Clark* is hardly an authority upon this point. *Doe dem. Bosnall* v. *Harvey* (which was decided after *Jesson* v. *Wright*), expressly recognises *Doe dem. Long* v. *Laming*; where the words "heirs of the body," were held to be words of limitation, upon the ground that if they were construed to be words of purchase, many objects of the testator's bounty would be deprived thereof. The defendants, in this case, have failed to shew that "issue" must of necessity be a word of limitation. They ask, in effect, that the whole estate shall be given to the eldest son by striking out the words of distribution.

The following certificate was afterwards sent: —

"This case has been argued before us; and we are of opinion that *Jonas Greenwood* took an estate for life in the devised premises under the will of *John Mitchell.*

"N. C. TINDAL.
"T. ERSKINE.
"W. H. MAULE."
"C. CRESSWELL.

(*a*) 1 *Beav.* 100. (*b*) 1 *Eden*, 424., *Amb.* 379.

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HAIGH *v.* JONES.

In *January* 1836 the defendant was charged in execution for 61*l.* 14*s.* On the 1st of *October* 1838 the 1 & 2 *Vict. c.* 110. came into operation. The plaintiff having afterwards died, and his widow having taken out administration,

ON the 15th of *June* 1835, the plaintiff obtained judgment against the defendant for 61*l.* 14*s.* In *January* 1836 the defendant was taken in execution thereon. In *January* 1843 the defendant endeavoured, through a friend, an attorney, to effect a compromise with Mr. *Hewson*, the plaintiff's attorney, who not only refused to receive less than the full amount for which the defendant was charged in execution, but also claimed to be entitled, under the 1 & 2 *Vict. c.* 110. *s.* 17. (*a*), to 4 per cent. interest on the judgment, from the time of entering it up; and he threatened that, unless his demand were complied with, he would take proceedings in the insolvent debtors' court for the purpose of obtaining a vesting

A., who had acted as attorney for the plaintiff, commenced proceedings in the insolvent court to obtain a vesting order upon the defendant's estate, under sect. 96. The defendant sent *B.* (an attorney) to *A.* to endeavour to effect a compromise. *A.* claimed 85*l.* 5*s.* 2*d.* including a claim for interest at 4 per cent. upon the judgment, from the time it was entered up, under sect. 17. It was ultimately agreed between *A.* and *B.*, that the defendant should be discharged upon payment of 80*l.*, which agreement was carried into effect. The court refused to compel *A.* to refund the sum of 18*l.* 6*s.*, the excess beyond the sum for which the defendant was taken in execution, it having been paid under a compromise.

Query, if the defendant was strictly liable to pay any interest on the judgment?

Semble (*per Coltman* J.) if the administratrix had revived the judgment by *sci. fa.* she would have been entitled to interest from the commencement of the act.

The rule called upon *A.*, "as the attorney *for the said plaintiff*," to refund the money: Held sufficient, notwithstanding the plaintiff had died before *A.* received the money.

(*a*) The act received the royal assent on the 1st *October* 1838.

Sect. 17. enacts "that every judgment debt shall carry interest at the rate of 4*l.* per centum per annum from the time of entering up the judgment, or from the time of the commencement of this act, in cases of judgments then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment."

order against the defendant under sect. 36. of the same statute. The amount so claimed by the plaintiff's attorney for debt, costs and interest was 85*l.* 5*s.* 2*d.*; and it was ultimately arranged between the attorneys who acted for the parties that the defendant should be discharged from custody upon payment of 80*l.*; which arrangement was carried into effect on the 18th of *February*. On the 8th of *March* following a summons was taken out on the part of the defendant, calling upon "Mr. *Hewson*, the attorney for the said plaintiff," to shew cause why he should not refund the sum of 18*l.* 6*s.*, being the excess over the sum for which judgment had been obtained, together with costs. On the 11th the summons was heard before Lord *Abinger* C. B., and dismissed; but time was given to enable the defendant to apply to the court.

Bompas Serjt., on a former day in this term, obtained a rule nisi to the same effect as the summons.

Byles Serjt. now shewed cause, upon an affidavit by Mr. *Hewson*, which stated that, having discovered that the defendant had become entitled to certain property by the death of a sister, the deponent had commenced proceedings in the insolvent debtors' court to obtain a vesting order, which was suspended in consequence of the negotiation for a compromise; and that the payment of the 80*l.* was the result of an agreement between the deponent and the attorney acting on the part of the defendant, which was entered into after a full discussion upon the facts and law of the case, and after reference to the statute and *Tidd's Practice* on the subject. It was also stated that the plaintiff had died, and letters of administration had been granted to his widow before the arrangement in question was carried into effect.

The learned serjeant took a preliminary objection

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that Mr. *Hewson*, at the time the negotiation was entered into, was not the attorney for the plaintiff *Haigh*, who was then dead, and therefore that the rule which was founded upon affidavits entitled in the cause, and which called upon Mr. *Hewson*, as the plaintiff's attorney, to refund the money, could not be enforced. [*Coltman* J. Does the fact of describing him as the plaintiff's attorney render him not liable, if the affidavits shew that he is so?] He did not receive the money as *Haigh*'s attorney. [*Tindal* C. J. He has received the proceeds of the action as an attorney of this court. Unless he is so bound up with the misdescription that we cannot see our way, surely we ought to go into the merits of the question.] The widow might have had a *scire facias* to revive the judgment. (He was then stopped by the court.)

Bompas Serjt., contrà. The rule calls upon Mr. *Hewson*, by name, to refund the money which it is alleged he has improperly received. [*Erskine* J. He has received it under an agreement between Mrs. *Haigh* and the defendant. *Tindal* C. J. The objection is, that the money was paid to him as the attorney for Mrs. *Haigh*.] It is, at best, a mere technical objection. [*Tindal* C. J. No; it goes to the substance. The defendant or his agent must have known that *Haigh* was dead, and that *Hewson* was acting for the widow.] He must have given the defendant a discharge in this cause. [*Byles* Serjt. That does not appear from the affidavits. *Tindal* C. J. The question is, whether the rule should not have brought Mrs. *Haigh* here, as the proper party. It does not appear that *Hewson* has paid over the money to her. The defendant might have brought an action against him alone. [*Tindal* C. J. Would that be so if the money was paid under an agreement, as here, for the use of another?] It is submitted that the action would lie before the money was actually paid over.

y were paid under duress of imprisonment to a
ithorised to receive it for another. [*Tindal* C. J.
l to *Stephens* v. *Badcock* (*a*), where it was held
attorney's clerk who had received money on ac-
f his master was not liable to the party who paid
noney had and received; inasmuch as the clerk
ountable for the money to his master.] An at-
stands in a different relation to his client from
a clerk.

Serjt. was then called upon to shew cause upon
its. Both sides were in error as to the claim for
. The defendant was liable to pay it — not
e time of entering up the judgment — but from
mencement of the act. But, in point of fact, the
was not paid in respect of interest, but as a com-
in respect of the proceedings in the insolvent
nd for other expenses; and that was the ground
lismissal of the summons by Lord *Abinger*.

as Serjt. The money was paid under duress,
erefore the agreement was not binding. Mr.
had no right to charge for *any* expenses. Even
g that the defendant was liable to pay interest
he judgment from the passing of the act, Mr.
has received something more than that sum
mount to. But no interest at all was due. The
nt was satisfied when the defendant was taken in
on. He was in custody for a judgment which
bear interest at the time the statute was passed.
visions apply only to cases where a judgment is
ding and unsatisfied. If the debt had been paid
lly upon the judgment, it clearly would not have
nterest. [*Maule* J. There could not have been
facias to revive the judgment if the debts had

(*a*) 3 *B. & Ad.* 354.

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been paid; if it had, there might have been.] At all events, the defendant ought not to pay the costs of this application. It is not in the nature of an appeal from Lord *Abinger*'s decision, as his lordship gave the defendant time to apply to the court.

TINDAL C. J. It does not appear to me that any undue advantage has been taken of the defendant in this case. Each party was represented by an attorney. They consult books; put their own construction upon the statute; and come to a specific agreement. I do not think it at all clear that an action for money had and received would lie under such circumstances. It may have been a great object to the defendant to avoid the process of the insolvent debtors' court. I cannot see any reason why we should set aside the agreement. The rule therefore must be discharged with costs.

COLTMAN J. I am of the same opinion. The money was paid under an arrangement which was the result of full deliberation. It is not necessary, therefore, to inquire whether the defendant was strictly liable to pay interest upon the judgment; though I am not prepared to say, if the administratrix had issued a *scire facias* to revive the judgment, that she would not have been entitled to interest from the time of the commencement of the 1 & 2 *Vict. c.* 100. The defendant might have paid the money under protest, if he had wished to raise the question as to his liability.

ERSKINE J. I am of the same opinion. I think there was no duress or fraud in the case. The defendant may have thought himself bound in conscience to to pay the interest on a sum of money which had been justly due to the plaintiff's estate for so long a time. At all events, the defendant had entrusted the arrangement to a friend, a professional man, who, after mature

leliberation with the party who had been the plaintiff's ıttorney, and with full knowledge of all the facts, came o the agreement under which the money was paid.

MAULE J. I quite agree that this was a reasonable ıgreement and compromise between the parties; and hat the dismissal of the summons by Lord *Abinger* was :orrect.

Rule discharged, with costs.

ABRAHAM BORRADAILE, Executor, &c., *v.* Sir CLAUDIUS STEPHEN HUNTER, Bart.

May 11.

COVENANT by the executor of the Rev. *William Borradaile*, upon a policy of insurance effected by The *London* Life Association (of which society the defendant and *George Dorrien*, since deceased, were two of the trustees) upon the life of the deceased *W. B.* for the payment of 1000*l.* within three months after proof of his death. Averment: of regular payment of the premium and performance of all covenants and conditions on the part of the deceased; that he died on the 16th of *February* 1838, of which notice was given to the society. Breach, non-payment. Profert of letters testamentary.

Plea, craving oyer of the policy, which was dated 30th of *May* 1828, and witnessed that, whereas the Rev.

A life policy of insurance contained a proviso (*inter alia*) that in case "the assured should *die by his own hands*, or by the hands of justice, or in consequence of a duel, "the policy should be void. The assured threw himself into the *Thames* and was drowned. Upon an issue whether the assured died by his own hands, the jury found that he "voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, and intending thereby to do so; but that at the time of committing the act he was not capable of judging between right and wrong:"

Held (*Tindal* C. J. *dissentiente*), that the policy was avoided, as the proviso included all acts of volentary self destruction, and was not limited by the accompanying provisoes to acts of *felonious* suicide.

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W. B., jun., vicar of *Wandsworth*, had agreed to become a member of the society called, &c., according to a deed of settlement bearing date, &c.; and whereas the said society had agreed to assure to *W. B.* the sum of 1000*l.*, to be paid to his executors, &c., after his decease, at the annual premium of 33*l.* 15*s.*: it then stated the payment of the first premium by *W. B.*, and his agreement to pay the annual premium in every succeeding year. The trustees then covenanted that if the assured should continue to pay the premium, and should well and truly perform and keep all covenants, conditions, &c. contained in the said deed of settlement, and all orders, rules, &c., made at any general court of the society, they, or the trustees for the time being, covenanted, within three calendar months after proof of the death of the assured, to pay to his executors, &c., the sum of 1000*l.*: — "provided, and it is hereby declared to be the true intent and meaning of this policy of assurance, and the same is accepted by the said assured upon these express conditions, — that in case the assured shall die upon the seas (except in such passages as are allowed by the rules of the society), or go beyond the limits of *Europe*, or enter into or engage in any naval or military service whatsoever, unless licence be obtained from a court of directors of the said society, or *shall die by his own hands*, or by the hands of justice, or in consequence of a duel, or if the age of the said assured does now exceed thirty-six years, or if the said assured be now afflicted with any disorder which tends to the shortening of life, or if a certain declaration bearing date the 28th day of *May* instant, made and signed by or on behalf of the assured, and forming the basis of the contract between the said assured and the society contains any untrue averment, — this policy shall be void." Signed by *George Dorrien*, and the defendant. The plea then continued thus: — "that true it is that the said *W. B.* died as

in the said declaration mentioned; but that the said *W. B.*, after the making of the said instrument or policy of assurance, to wit, on the 16th day of *February* A.D. 1838, so *died by his own hands*, whereby the said instrument or policy of assurance became void." Verification.

Replication, that the said *W. B.* did not die by his own hands, *modo et formâ;* upon which issue was joined.

The cause was tried before *Erskine* J. at the *London* sittings after *Michaelmas* term, 1841; when it was proved on the part of the defendant, that on the night of the 16th *February* the deceased threw himself from *Vauxhall Bridge* and was drowned; and it was contended that it was not competent to the plaintiff to go into any question as to the insanity of the deceased, inasmuch as if his death was in fact occasioned by his own hand or act the policy was void, and that it was immaterial whether he was sane or insane. On the part of the plaintiff it was argued that the real question to be tried was, whether the deceased had committed *suicide*, such being the sense of the words "shall die by his own hands;" and that the question to be considered was, whether the assured was or was not in a sane state of mind at the time he committed the act; or, in other words, that it must have been the intentional act of a sane man having the control of his will, to bring it within the condition in the policy.

The learned judge expressed his opinion that if the deceased's mind was so far gone that he did not know the consequences of the act and the mind was not moving to the act, it was not within the proviso; but his lordship said that in case this might not be the true construction of the proviso, the question had better be submitted to the jury in both points of view so as to avoid the expense of another trial; and he suggested the following mode of leaving the questions: —

"First: Did the deceased wilfully cast himself into

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the water with the intention of destroying his life, knowing it at the time.

"Secondly: Whether at the time he was in such a state of mind that he was not a morally responsible or accountable being."

This arrangement having been assented to by the counsel on both sides, the cause proceeded; and a great deal of evidence was produced to shew the insanity of the deceased.

The learned judge in summing up told the jury that the question they had to decide was, whether, according to the meaning of this policy, the Rev. Mr. *Borradaile* had died by his own hands. In his (the judge's) opinion the true construction of the instrument was, — that if the assured by his own act intentionally destroyed his own life, and that he was not only conscious of the probable consequences of the act, but did it for the express purpose of destroying himself voluntarily, having at the time sufficient mind to will to destroy his own life — the case would be brought within the condition of the policy. But if he was not in a state of mind to know the consequences of the act, then it would not come within the condition. The jury would first say, therefore, whether according to the evidence, they were satisfied, that the deceased came to his death by his own voluntary act, knowing at the time what the consequence of it would be — that is, whether he threw himself into the water for the purpose of destroying his life, being in a state of mind to will to do so: and next, whether, at the time of destroying his life, he was capable of distinguishing between right and wrong, so as to be a morally responsible agent.

The jury, after retiring, returned the following verdict: "That Mr. *Borradaile* threw himself from the bridge into the water with the intention of destroying life; and, previous to the said act, there is no evidence of insanity."

This finding not being considered satisfactory by the learned judge as not indicating the state of the assured's mind *at the time* he committed the act in question, the jury again retired, and then returned their verdict in these words: —"That Mr. *Borradaile* voluntarily threw himself from the bridge with the intention of destroying life; but at the time of committing the act, he was not capable of judging between right and wrong."

It was submitted by the plaintiff's counsel, that this was in substance a verdict for the plaintiff. The judge, however, thought the verdict had better be entered *pro formâ* for the defendant; with liberty for the plaintiff to move that it be entered for him, with 1177*l.* damages, which were assessed by the jury; being the 1000*l.* insured by the policy with interest thereon at 5 per cent. from the 1st of *July* 1838, when the money became payable according to the stipulation of the policy.

In *Hilary* term, 1842, Sir *Thomas Wilde* Serjt. obtained a rule nisi to set aside the verdict for the defendant, and enter a verdict for the plaintiff accordingly. He referred to the unreported cases of *Garrett* v. *Barclay* (*a*), *Kinnear* v. *Borradaile* (*b*), and *Kinnear* v. *Nicholson.* (*c*)

(*a*) *Garrett* v. *Barclay.* — This case was tried befor *Alexander* C. B. at the *London* sittings after *Easter* term 1826.

It was an action on a policy of assurance granted by *The Rock* Life Assurance Office on the life of *Daniel Rainier* for 3000*l.* The policy was effected in 1812. The words in the condition of the policy were —

"In case the said *D. R.* should commit suicide, or die by duelling or the hands of justice, or upon the High Seas &c., the policy to be void."

The defendant pleaded that *Daniel Rainier* had committed suicide, and the policy had become forfeited. The replication denied that he had committed suicide. Issue joined.

It was contended by Mr. *Jervis*, the plaintiff's counsel, that the object of the proviso was to guard against frauds by persons insuring their lives, and shortly afterwards preferring death to benefit their families; and that *Rainier* being insane did not commit suicide.

It appeared that the assured

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Channell Serjt. (with whom was *W. H. Watson*) shewed cause in last *Trinity* term. (*a*)

The question in this case is as to the meaning of the

Daniel Rainier had for some time laboured under insanity, and that on the morning of the 17th of *March* 1825, he was found drowned in a pond of water; it further appeared that in the night, he had undressed himself, and folded and laid his clothes on the *butting* of a hay-stack, and had walked near 100 yards naked to the pond in which he was found; the water was shallow, not three feet deep at that spot; and he was found in the morning, his back quite out of the water and his head under the water, quite dead; the finding of the coroner's jury was, that he destroyed or drowned himself in a fit of insanity. At the trial a question was raised, whether the assured had not gone to the pond to bathe, — it being shewn that he was accustomed to bathe, — and died from apoplexy.

The Lord Chief Baron told the jury that the question was, whether under the circumstances they were satisfied that *Rainier* died by taking measures intending to kill himself, or whether he died by taking measures without any such intention; that beyond all doubt he was insane; that it was suggested that he had gone to the pond to bathe; but that was a question for them.

The jury found a verdict for the plaintiff; *being of opinion that Rainier did not commit suicide.* *

(*b*) *Kinnear* v. *Borradaile.* — This was an action upon a policy for 2000*l.* effected upon the life of *Thomas Kinnear* with *The Rock* Life Assurance Company, containing a similar proviso with that in the case of *Garrett* v. *Barclay* (*supra*, p. 643. n.) The defendants pleaded that the assured "did commit suicide."

The cause was tried before Lord *Tenterden* C. J. at the sittings in *London*, after *Hilary* term 1832. The defence set up was, that Mr. *Kinnear*, who was found dead in his bed on the morning of the 21st of *October* 1830, had caused his own death by taking poison. An inquest had been held upon the body, and a verdict returned of "died by the visitation of God." The jury returned a verdict for the plaintiffs.

(*c*) *Kinnear* v. *Nicholson.* —

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* These words in italics are taken from the indorsement on the brief of one of the counsel in the cause. It may be doubtful whether they imply that the assured came to his death by natural causes, such as apoplexy, as was suggested; or that, being in a state of insanity, he could not commit the *crime* of *suicide.*

term "dying by his own hands." The defendant submits that if the deceased, by his own personal agency, destroyed his life, intending to do so, the policy is avoided. The plaintiff, on the other hand, insists that, although the deceased may have destroyed his life in the manner stated, still if he was insane at the time or incapable of distinguishing right from wrong, the policy is not avoided.

It is not contended on the part of the defendant that the policy would be avoided by a mere accidental destruction of life by the party himself; but it would be if the act was done intentionally, even though circumstances might exist which would exempt the party from all moral culpability. The expression must receive a reasonable construction, and must be taken to mean, if the party shall die *by his own act.* The effect of the verdict is, that the deceased threw himself off the bridge, knowing that he should thereby destroy life, and intending so to do; but it relieves him from all imputation of crime, inasmuch as he could not at the time distinguish between right and wrong. The verdict shews a consciousness of the act and its consequences, but no culpability. But all inquiry as to criminality is besides the present question. If, under similar circumstances, Mr. *Borradaile* had destroyed the life of another person, and the

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This case arose upon a policy for 4000*l.* effected upon the life of the same gentleman (Mr. *Kinnear*) with *The National* Life Assurance Society, which was also subject to a proviso or condition, "that assurances would be void if the parties whose lives had been assured, should go beyond the limits of *Europe*, &c.; and that assurances made by persons on their lives would become void *if they should die* by duelling *by their own hands*, or by the hands of justice." The cause was not tried, it having been agreed between the parties, that it should abide the event of *Kinnear* v. *Borradaile.*

(*a*) 6th *June.* Before *Tindal* C. J., *Coltman*, *Erskine* and *Maule* J.J.

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issue had been whether such person had died by the hands of Mr. *Borradaile*, it would surely not have been necessary in order to support the issue to show that the act by which the party came to his death was criminal. Nor is it necessary for the defendant to argue, that, if an assured had come to an *accidental* death by his own hands — as if a man, having been blooded, should in a state of delirium tear off the bandages and bleed to death, or should by mistake take a wrong medicine and die in consequence — in such case the policy would be avoided. [*Tindal* C. J. If it were so indeed no policy would be worth much.] But here, there is a voluntary act producing death, with a knowledge and intention that it should do so. The contract which the defendant has entered into is to pay a sum of money on the death of a certain party, provided it does not happen in a particular way. It may be argued on the other side that the self destruction of the deceased was occasioned by disease, and that disease is a peril insured against. But that is not so. Death is the only event that is insured against—an event which is certain, though the time at which it may occur is not so. It is not necessary to contend that, if mental disease accelerated or even conduced to death, the policy would be avoided, provided the death were not caused by the personal agency of the assured. It is clearly no part of the contract that he should accelerate death by his own act. But here, the assured by his own personal act, consciously produced his own death, which is the very event insured against. It will be urged on the part of the plaintiff that from the whole of the policy it is clear that the *intention* of the party must be taken into consideration; that the other conditions with which the one in question is associated, namely "dying by the hands of justice or in consequence of a duel," imply criminality, and therefore that "dying by his own hands"

must have the same meaning. But there is no necessary connection between the clauses. In *Kinnear* v. *Borradaile* the issue was in direct terms whether the assured had "committed suicide." The other case of *Kinnear* v. *Nicholson*, where by the terms of the policy as in this case it was to be void if the party died "by his own hands" was not tried. In *Garrett* v. *Barclay* there was a general verdict for the plaintiffs which was acquiesced in. That case is strongly in favour of the defendant. If the death of the assured there was unintentional, produced by apoplexy or accident, the policy would attach: but it would not if the party had intended to produce death, although his insanity was clearly proved. The jury therefore must have negatived the intention. The argument on the other side amounts to this; that there can be no voluntary death where a party is not of sane mind.

Sir *T. Wilde* Serjt. and *R. V. Richards*, in support of the rule. It is obvious that the words of the policy are not to be taken in their strictly literal sense; otherwise Mr. *Borradaile* could not be said to have died by his own *hands*. The term is equivocal and requires explanation. The insurance company might have worded the condition thus—"If he die by his own hands, whether sane or insane;" and then the meaning of the contract would have been clear. The expression, being ambiguous, is to be taken most strongly against the party using it, namely, the insurer. It is admitted on the other side that the policy would attach where death had been produced by the personal act of the assured, if such act were by mistake or accident. The plaintiff submits that the intent of the party is also to be taken into consideration. The terms "suicide" and "dying by one's own hands" are generally used "synonymously;" and the former term is the one adopted by many of the in-

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surance offices. (*a*) The contract of insurance is based upon certain calculations. Death produced by disease, whether directly or indirectly, may be the subject of cal-

(*a*) The following are the provisoes avoiding the policies issued by some of the principal *London* Insurance Companies, which bear upon this question.

The Alfred. — "Policies effected on their own lives by persons who shall die by *suicide* or duelling, will remain in force to the extent of such *bonâ fide* interest as any other person shall have acquired therein."

The Argus. — "Every policy effected by a person on his or her own life shall be void, if such person *commit suicide*, or die by duelling or the hands of justice: but if any policy effected by a person on his or her own life, shall afterwards be actually assigned to any person or persons by way of mortgage, or for the benefit of any creditor or creditors, or charged with any sum or sums for the benefit of any mortgagee or mortgagees or creditor or creditors, and the person on whose life the assurance shall have been effected shall *commit suicide*, or die by duelling or by the hands of justice, then the policy so assigned or charged shall not be void to the extent of the principal sum or sums, and interest secured by the assignment or charge; or if any policy effected by any person on his or her own life shall afterwards be absolutely assigned to a purchaser for valuable consideration in any transaction (except that of settlement upon or after marriage, or any other occasion), and the person on whose life the assurance shall have been effected, shall *commit suicide*, or die by duelling or by the hands of justice, then the policy so assigned shall continue in full force, notwithstanding such *suicide* or death."

The Atlas. — "Assurances made by persons on their own lives will be void if they die by the hands of justice, by duelling or by *suicide*."

The Eagle. — "By the death of the said &c. by *suicide*, by duelling or by the hands of justice."

The Globe. — "Should the assured die by duelling, *suicide* or the hand of justice."

The London Assurance. — "If the assured shall die by *suicide* or by duelling or by the hands of justice."

The Pelican. — "Should the said assured die by duelling, *suicide* or the hand of justice."

The Rock. — "In case the said, &c. shall *commit suicide*, or die by duelling or the hands of justice." (The cases of *Garrett* v. *Barclay*, *suprà*, p. 643. n., and *Kinnear* v. *Borradaile*, *suprà*, p. 644. n., arose on this form of policy.)

The Equitable. — "In case the assured shall die *by his own hands* or the hands of justice," &c. (This company paid a policy of 3000*l.* to the executors of Mr. *Borradaile*.)

The Guardian. — "Or if the said *A. B.* said shall die *by his own hands* or by duelling or by the hands of justice."

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due proof of the extent of such interest being made to the directors. And if any person assured upon his own life, and who shall have been so for at least five years, shall die *by his own hands,* and *not felo de se,* the directors shall be at liberty, if they shall think proper, to pay, for the benefit of his family, any sum, not exceeding what the society would have paid for the purchase of his interest in the policy, if it had been surrendered to the society the day previous to his decease; provided that the interest in such assurance shall be in the assured, or in any trustee or trustees, for him or for his wife or children, at the time of his decease."

The National.—"Assurances made by persons on their own lives, will become void if they die by duelling *by their own hands* or by the hands of justice." (The case of *Kinnear* v. *Nicholson, suprà,* p. 645. n. arose upon this form of policy.)

The North British.—"Assurances made by persons on their own lives who shall die by duelling or *their own hands* or by the hands of justice, will be cancelled so far as respects such persons; but shall remain in force so far as any other person or persons shall then have acquired a *bonâ fide* interest therein by assignment, or by legal or equitable lien; and if any person assured upon his own life shall so die, the directors or managers shall be at

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risk. [*Maule* J. The insurance offices do not do so in all cases. If a policy is effected on the life of a third person, it is not usual to insert a clause avoiding the

liberty, if they shall think proper, to pay for the benefit of his family any sum not exceeding what the corporation would have paid for the purchase of his interest in the policy if it had been surrendered to the corporation the day previous to his decease; provided that the interest in such assurance shall be in the assured, or in any trustee or trustees for him or for his wife or children at the time of his decease."

The West of England. — "Policies effected by persons on their own lives, who shall die by duelling, *by their own hands* or by the hands of justice, will, so far as regards the assured, become void; but notwithstanding this provision, such assurance will be held valid so far as extends to any *bonâ fide* interest acquired by any other person under an actual assignment, by deed for a valuable consideration in money, or by virtue of any legal or equitable lien as a security for money, upon proof of such a subsisting interest being given to the directors to their satisfaction; and if any person assured upon his own life, and having been so assured for five years at least, shall die *by his own hands*, and *not felo de se*, the directors will be at liberty, if they shall think proper, to pay for the benefit of his family, any sum not exceeding what the company would have paid for the purchase of his interest in the policy, if it had been surrendered on the day previous to his decease, provided the interest in such assurance shall be in the assured or in a trustee for him, or for his wife or children at the time of his decease."

One of the rules of *The London Life Association* (which was not given in evidence) is as follows: —

"The policies of persons on their own lives also become void if the assured die *by his own hands*, or by the hands of justice, or in consequence of a duel. But the court of directors in cases of *suicide not felo de se*, are authorised to pay the legal holder of the policy any sum they may think fit, not exceeding the value of the policy on the day preceding the decease of the assured."

And the following is the order of the general court (dated 13th *January* 1830) relating to policies effected with the association; (also not in evidence).

"That in all cases where any policy or policies of assurance shall have been granted by this society to any person or persons upon their own lives, and where the assured shall die *by their own hands*, and not felo de se, the directors be authorised and empowered to pay, if they shall think fit, upon an examination of all the circumstances of the case, to the per-

olicy in the event of his suicide.] The death in this ase was the result of disease producing madness. It is rgued on the other side, that as the deceased *intended* elf-destruction, his death must be considered as his wn act. But intention almost always exists, even in he strongest cases of insanity, or of somnambulism; but hat is not the legal meaning of intention; it means an ntention that is subject to reasonable control. It is dmitted that if this were a question of crime, the deeased must be held free from all culpability. The eason given by Lord *Coke* (*a*) and adopted by Lord *Hale* (*b*), why a lunatic cannot commit high treason is ecause he is "totally deprived of all compassings and imaginings." The same rule is laid down by Serjt. *Hawkins*. (*c*) So that if a madman were with his own hand to kill the Queen, he would not be guilty of high treason, because he could not be said to have "imagined" Her Majesty's death. Neither can he be said, in a legal sense, to *intend* his own. The intention meant is not that of a madman or a brute animal, or that which may even be said to exist to a certain extent in some vegetables. Self-destruction, to be free from moral culpability, must be the result either of disease or of delusion, such as occurs in the calenture, which is defined by *Johnson* to be a distemper peculiar to hot climates, under the influence of which sailors imagine the sea to be green fields, and throw themselves into it. A man might wake from a state of somnambulism and find himself on the brink of a precipice, and under an irresistible impulse

son or persons legally entitled to the policy at the time of the decease, any sum or sums of money not exceeding in amount the value of the policy on the day preceding the decease of the life assured, computed in the manner adopted by the society in cases of policies purchased by them."

The company had in fact offered before the trial of this case to pay the plaintiff the sum of 182*l.* 11*s.* as the value of the policy at the time of the death of Mr. *Borradaile*; but the offer was declined.

(*a*) 3 *Inst.* 6.

(*b*) *Hale, P. C.* Ch. 4.

(*c*) *Hawk. P. C.* B. 1. Ch. 1.

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might throw himself down. But in either case how does a death so produced differ from one occasioned by accident? A diseased brain may produce a paralysed limb which is utterly beyond the control of the party; or it may produce a state of mind and intention equally beyond his control. The legal result of the verdict in this case amounts to a finding that Mr. *Borradaile* was *non compos mentis* at the time he made away with himself; it excludes therefore the existence of any sane intention on the part of the deceased at the time of his death; and it never could have been intended that the policy was to be void in case of death occasioned by insanity. [*Coltman* J. The policy is to be void in case the assured goes beyond the limits of *Europe*. Suppose an assured in a state of insanity were to go to *America*, would not the policy be avoided?] The terms in this case are quite unambiguous; though even then perhaps the question might be arguable (*a*); but here the expression is clearly figurative.

Cur. adv. vult.

The learned judges, not being unanimous, now delivered their judgments *seriatim*, as follows: —

MAULE J. In the judgment I am about to deliver, I have not stated the facts, not having adverted to the circumstance of my opinion being delivered the first; they will, however, no doubt be fully stated by the learned judge before whom the cause was tried.

I have had much doubt in this case, but the conclusion at which I have at last arrived, is, that the verdict for the defendant was right. The question is, what is the meaning, in the policy on the testator's life, of the words "in case the assured shall die *by his own hands*."

(*a*) Suppose he was carried there as a prisoner of war.

In construing these words, it is proper to consider, st, what is their meaning in the largest sense, which, cording to the common use of language belongs to m; and, if it should appear that that sense is larger n the sense in which they must be understood in the rument in question, secondly, what is the object for ich they are used. They ought not to be extended ond their ordinary sense, in order to comprehend a e within their object, for that would be to give effect an intention not expressed; nor can they be so rected as to exclude a case both within their object within their ordinary sense, without violating the damental rule which requires that effect should be en to such intention of the parties as they have used words to express.

The words in question in their largest ordinary sense prehend all cases of self destruction, and certainly lude the case of the present testator; but, as it is nitted that in their largest sense they comprehend ny cases not within their meaning, as used on the sent occasion, it is to be considered whether the case the testator falls within the object for which they are ed in this policy. A policy by which the sum insured payable on the death of the assured in all events, ves him a pecuniary interest that he should die imediately, rather than at a future time, to the extent of he excess of the value of a present payment over a deferred one, and offers therefore a temptation to self-destruction to this extent. To protect the insurers against the increase of risk arising out of this temptation is the object for which the condition in question is inserted. It ought, therefore, to be so construed as o include those cases of self-destruction in which, but or the condition, the act might have been committed n order to accelerate the claim on the policy, and to xclude those in which the circumstances, supposing he policy to have been unconditional, would shew that

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the act could not have been committed with a view to pecuniary interest. This principle of construction requires and accounts for the exclusion from the operation of the condition of those cases falling within the general sense of its words, to which it is admitted not to apply — such as those of accident and delirium. To apply it to the present case: it appears by the finding of the jury, that the testator voluntarily threw himself into the water, intending to destroy his life, but that at the time he did so he was not capable of judging between right and wrong; and, as a man who drowns himself voluntarily may do it to found a claim on a policy, though he may not think it wrong to do so, or though his mind may be so diseased that he does not know right from wrong — which, as I understand the finding of the jury, was the case with the testator — it seems to me that the object of the condition would not be effected unless it comprehended such a case of self-destruction.

For these reasons, I think the defendant ought to retain the verdict, though I cannot but distrust my opinion when it differs from the judgment of the Lord Chief Justice. It is also impossible not to feel that the condition in question is, in respect of the amount of forfeiture, a hard one, as it goes beyond what is necessary to remove the temptation to suicide arising out of the claim acquired by the death of the party. That object would be effected by reducing the claim in case of suicide, to the amount for which the policy could have been sold immediately before the death of the assured, as completely as by a forfeiture of the whole.

ERSKINE J. The only issue in this cause was raised upon a traverse by the plaintiff of an averment in the plea that the assured, *William Borradaile*, died by his own hands. Upon the trial of that issue before me at

ıe *London* sittings after *Michaelmas* term, 1841, it ap- :ared in evidence that the testator had thrown himself)m the parapet of *Vauxhall Bridge* into the river *Thames*, d was drowned; and the defence was, that this act of f-destruction avoided the policy, under the proviso ich declared that the policy should be void if the ured should die by his own hands. To this it was lied, that the testator was insane at the time, and, refore, that the case did not fall within the true aning of the proviso — first, because under such cir- nstances it could not properly be said to have been act of the assured at all; and, secondly, because, m the context it was obvious that *criminal* acts of f-destruction alone were contemplated by the parties the contract; and that, as it would be proved that e deceased was not in a state of mind to be morally sponsible for his acts, the proviso did not apply to his se. This made it necessary for me to decide, first, hether the proviso extended to all acts of self-destruc- on by the assured, or only to acts resulting from a riminal intention, and also in what way the question f insanity ought to be left to the jury. On the part of the lefendant it was contended that the terms of the proviso, in their fair and ordinary meaning, were large enough to include, and were evidently intended to include, all acts of self-destruction, whether accompanied by a cri- minal purpose or not; while, on the part of the plaintiff, it was argued, that, if it could be shewn that Mr. *Bor- radaile* was in such a state of mind at the time as to be morally and legally irresponsible for his acts, the pro- viso would not apply to this case: and, as a test of his responsibily, the jury were invited to consider whether, as a coroner's jury, they could have returned a verdict of *felo de se;* or if, sitting as a petty jury on the trial of Mr. *Borradaile* for the destruction of the life of another man, they could have found him guilty of felony. I

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thought, that, as the words of the proviso, according to their ordinary acceptation, were large enough to include all intentional acts of self-destruction, whether criminal or not, if the deceased was labouring under no delusion as to the physical consequences of the act he was committing — if he knew that it was water into which he was about to throw himself, and that the consequence of his leaping from the bridge would be his death — and if he voluntarily threw himself from the bridge into the river, intending by so doing to drown himself — the question, whether he had been thereby guilty of a crime, as *felo de se*, or whether, if he had at that time destroyed the life of another instead of his own, he was in a state of mind to be morally and legally responsible for his acts, was irrelevant to the question before the jury — that the state of the mind of the assured was only material for the purpose of ascertaining whether the act of self-destruction was a voluntary and wilful act, for the purpose of destroying his life. And I so directed the jury: but, in order to save the parties from the expense of a second trial if the court should think that the terms of the proviso included only criminal self-destruction, I left it to the jury, in the terms usually adopted in criminal trials, to find whether at the time of throwing himself from the bridge, Mr. *Borradaile* was so far deprived of his reason as to be incapable of judging between right and wrong — reserving, by consent, to the plaintiff leave, if necessary, to move to enter a verdict for him upon the whole finding of the jury.

The jury found that Mr. *Borradaile* voluntarily threw himself into the river, knowing, at the time, that he should thereby destroy his life, and intending thereby to do so; but that, at the time of committing the act, he was not capable of judging between right and wrong.

Upon this finding, the verdict, according to the opinion I had expressed, was entered for the defendant,

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ubject to the leave reserved. The point was argued in *Trinity* term last, and the court took time to consider ts judgment: and, after the most attentive and anxious consideration, I continue to think that the defendant ught to retain the verdict as entered for him. The anguage adopted by the society is certainly not well elected; because, if taken literally, this case, and all ther cases in which the work of self-destruction might e effected otherwise than by the *hands* of the assured, ould be excluded from the operation of the proviso; hile all cases of unintentional self-destruction by the ands of the assured, would be included in it. But it as very properly conceded by the counsel for the laintiff, that the clause must receive a reasonable construction, according to the plain and obvious intention of he parties, as collected from the whole of the instrument, nd, therefore, that the proviso might be construed as if he words had been, "if the assured shall die by his wn act." But then it was claimed on the part of the laintiff, that the same liberal principle of construction hould be carried out further, and that such acts only hould be considered to be within the terms of the proiso, as were the result of the free and intelligent will nd purpose of the assured while his conduct was under he control of his reason and judgment; and that the nding of the jury shewed that such was not the case ith Mr. *Borradaile.*

In considering this question, I will examine it, first, s if that branch of the proviso upon which the issue as raised in the pleadings, had formed the only conlition upon which the policy was declared void; and ext, in connection with the context, which has been upposed to assist in giving the words in question a imited construction. Looking simply at that branch of he proviso upon which the issue was raised, it seems o me that the only qualification that a liberal inter-

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pretation of the words, with reference to the nature of the contract, requires, is, that the act of self-destruction should be the voluntary and wilful act of a man, having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act; and that the question whether at the time he was capable of understanding and appreciating the moral nature and quality of his purpose, is not relevant to the inquiry, further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself.

It has been argued, on the part of the plaintiff, that, as the very object of a life insurance is, to secure a provision for a surviving family against the fatal consequences of decease in the assured, if the act occasioning the death can be traced as the result of a diseased mind, the case comes within the main scope and object of the contract of insurance. This argument would have been unanswerable if the policy had been wholly silent on the subject, as in the case of *The Amicable Life Insurance Company* v. *Bolland* (*a*); or if the proviso had been couched in terms pointed only to acts resulting from a criminal intention; but the very object of a proviso like the present, is to take out of the operation of the general terms of the policy, death resulting from causes which would otherwise fall within the general scope of the contract, although, *ex abundanti cautelâ*, it also includes cases which the law itself would except, as those of criminal suicide, and death by sentence of the law or duelling. As there is nothing, therefore, in the words now under examination, taken in their ordinary grammatical sense, either when considered alone

(*a*) *Selw. N. P.* 10th ed. 1033., 4 *Bligh, N. S.* 194., 2 *Dow, & Cl.* 1.

or with reference to the nature and object of the contract of insurance, that requires that they should be limited to acts resulting from criminal intention, I am of opinion that they ought not to be so confined, unless from the context it plainly appears that it was the intention of the parties so to limit and qualify them. The only case cited in which a policy couched in the same terms has come under legal discussion, is that of *Kinsear* v. *Borradaile*: but, as the point was not raised in that case, the result ought, I think, to have no weight as an authority to influence the court in this.

It appears, indeed, to me, that, excluding for the present the consideration of the immediate context of the words in question, the fair inference to be drawn from the nature of the contract would be, that the parties intended to include all wilful acts of self-destruction whatever might be the moral responsibility of the assured at the time: for, although the probable results of bodily disease producing death by physical means may be the fair subjects of calculation, the consequences of mental disorder, whether produced by bodily disease, by external circumstances, or by corrupted principle, are equally beyond the reach of any reasonable estimate. And reasons might be suggested why those who have the direction of insurance offices should not chose to undertake the risk of such consequences, even in cases of clear and undoubted insanity. It is well known that the conduct of insane patients is, in some degree, under the control of their hopes and fears, and that especially their affection for others often exercises a sway over their minds where fear of death or of personal suffering might have no influence: and insurers might well desire not to part with this restraint upon the mind and conduct of the assured, nor to release from all pecuniary interest in the continuance of the life of the assured, those on whose watchfulness its preservation might de-

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pend; and they might, further, most reasonably desire to exclude from all questions between themselves and the representatives of the assured, the topic of criminality so likely to excite the compassionate prejudices of a jury, which were most powerfully appealed to on the trial of this cause.

I trust that I shall not be understood as suggesting that any or all of these considerations would warrant the court in straining the language of the proviso beyond its fair grammatical import. I most fully assent to the proposition that we must ascertain the meaning of the assurers from the language they have employed. I am only desirous of explaining why I think that the more comprehensive and ordinary meaning of the words under consideration is in accordance with the probable intention of the parties, rather than the more qualified sense contended for on the part of the plaintiff. And, when I find the terms "shall commit suicide," that have been popularly understood and judicially considered as importing a criminal act of self-destruction, exchanged for terms not hitherto so construed, it may, I think, be fairly inferred that the terms adopted were intended to embrace all cases of intentional self-destruction, unless it can be collected from the immediate context that the parties used them in a more limited sense. And here the strongest part of the plaintiff's argument arises, and one upon which I express my opinion with the greatest distrust of its soundness, when I find it opposed to that of the Lord Chief Justice. But as I feel that the parties have a right to demand the expression of my own judgment upon the question in litigation, I will give my reasons for thinking that we are not warranted by the context in reading the words in question in any other than their general and ordinary sense. The proviso runs thus — "that, in case the assured shall die upon the seas (except in such passages as are allowed by the

rules of the society), or go beyond the limits of *Europe*, or enter into or engage in any naval or military service whatsoever, unless license be obtained from a court of directors of the said society, or *shall die by his own hands, or by the hands of justice, or in consequence of a duel*, or if the age of the assured does not exceed thirty-six years, or if the assured be now afflicted with any disorder which tends to the shortening of life, or if the declaration bearing date &c. contains any untrue averment, this policy shall be void." And it has been argued, that, as the other two cases included in that branch of the proviso at the head of which the words in question stand, necessarily involve the criminality of the act, the meaning of the whole clause may be fairly assumed to exclude all acts of which a criminal purpose does not form an ingredient.

The answer that suggests itsslf to this argument is, that other conditions precede and follow this clause which involve no criminality of intention, to some of which conditions no such intention could by any fair inference be possibly attached, and to others (which are also open to the inference arising from the context) the courts of law have decided that no such inference does attach.

If an inference of guilty intention was to be communicated from one branch of the proviso to another, no clause would seem so open to such an inference as the clause which excepts from the risks of the policy any disorder tending to shorten life, with which the assured was afflicted at the date of the policy. And it might surely with equal force at least be argued that this clause could only be intended to include disorders of which the assured was *cognizant* at the time; and yet by the case of *Duckett* v. *Williams* (*a*), it has been decided that

(*a*) 2 *C. & M.* 348., 4 *Tyrwh.* 240.

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the clause extends equally to all existing disorders tending to shorten life, whether the assured was aware of their existence or not. And, further, it may be asked, is it so very clear, that, in cases of death by duelling, the moral responsibility of the assured at the time would form any ingredient in the inquiry? Would not the question now under discussion be quite as open in that instance as in this? If so, the argument arising from the context is reduced to this, that, as the branch of the clause immediately following the words in question, and with which it is grammatically most closely connected (the same verb governing both branches), necessarily involves the existence of a criminal intention, therefore every branch of that clause must be considered as including a similar intention. It does not appear to me, that, when the whole of the context is considered, this argument affords a sufficient ground for departing from the ordinary sense of the words in question by giving them a limited meaning, and, one less consistent, as it strikes my mind, with the general scope and object of the contract than the larger and more obvious construction of the terms would convey. In my opinion, therefore, the rule ought to be discharged.

COLTMAN J. This was an action on a policy of insurance on the life of Mr. *Borradaile*. The policy contained an exception by which persons dying by their own hands, or by the hands of justice, or in consequence of a duel, are excluded from the benefits of the policy; and the question was, whether Mr. *Borradaile* died by his own hands within the meaning of the exception.

The death in this case was occasioned by Mr. *Borradaile*'s throwing himself into the *Thames*. The jury returned a verdict for the defendant; and further they found that he (Mr. *Borradaile*) voluntarily threw himself into the water, knowing at the time that he should thereby

destroy his life, and intending thereby so to do, but that at the time he did so he was not capable of judging between right and wrong.

In the argument for the plaintiff, it was assumed that this was equivalent to a finding that Mr. *Borradaile* was so far disordered in his intellects as to be exempt from criminal responsibility; and, without any critical examination of the terms of the finding, I will suppose the assumption to be correct. Supposing, then, that such is the meaning of the finding, is the deceased on that account to be considered not to have died by his own hands? It cannot be denied that a party who voluntarily throws himself into the water with intent to destroy himself, and is thereby destroyed, falls within the words of the exception of the policy. He certainly dies by his own hands, if the exception is to construed according to the literal import of the words made use of.

In construing the meaning of contracting parties, we ought to conclude that they mean what they say, unless there is some strong ground for putting a different sense on their words from that which they naturally import. But it is urged, that, in this case, the words of the exception are not to be construed in a literal sense; for, many cases may be put which fall within the literal terms of the exception, which yet cannot reasonably be supposed to fall within the intention of the contracting parties; as, if in a state of delirium a man should remove bandages from a vein which had been opened, without being aware of the consequences, or should take poison by mistake. It may be true that there may be certain acts done by the hands of a party which occasion his death, where, such acts not having been done intentionally by the party, he might not be considered as having died by his own hands within the meaning of the policy. In such cases, a limitation not expressed might perhaps, though not without some violence to the

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words, be introduced in construing the words of the exception, where such a limitation is necessary to give effect to what is assumed to be the clear intention of the contracting parties; yet it will not follow that a further limitation ought to be introduced in a case where there is no sufficient ground for inferring that such a construction is in accordance with the intention of the contracting parties.

Is there, then, in this case any sufficient ground for inferring the intention of the exception to have been, that, in a case like the present, the office should be responsible? In my humble judgment the reverse is to be inferred. The directors of this insurance company, as practical men, must be well aware that, if it is to be made a question before a jury between them and a plaintiff in the situation of this plaintiff, whether the party insured was of sane mind at the time of his decease, their chance of obtaining a verdict would be but small. The act of self-destruction would of itself be considered as a proof of insanity, and compassion for a distressed family struggling with a large and wealthy body would in most cases prevent any calm appreciation of the evidence. I cannot, therefore, think that it was the intention of the office, in framing this exception, to subject themselves to liability in any case of voluntary self-destruction. It may be said that it was incumbent on the directors of this company to express themselves in clear and unequivocal terms. I agree that this is so; but it appears to me that the words, as they stand in the policy, are of themselves plain and explicit, and that, when words are plain, it then becomes the duty of the person who seeks to depart from the literal terms made use of, and to introduce a limitation which the words themselves do not import, to shew some clear grounds on which he is entitled to introduce it.

It was further urged on behalf of the plaintiff, that, at

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any rate, to bring a case within the meaning of the exception, there must be an intention in the party to die by his own hands; and it was urged that an insane person could not be considered as having any intention; that by an intention was meant a controllable intention; that it was like the case of a man who should find himself suddenly on the brink of a precipice and irresistibly impelled to throw himself down it. But the fact in this case does not bear out the argument; there is no ground for saying that Mr. *Borradaile* acted under any such uncontrollable impulse; on the contrary, the jury have found that he did the act voluntarily, which implies that he had power to do the act or to abstain from it.

On these grounds, though with that doubt which the difference of opinion in a high quarter makes me feel in the soundness of my own judgment, I think that the verdict for the defendant ought to stand.

TINDAL C. J. It appears to me, on the best consideration I can bring to this case, that the plaintiff is entitled to the judgment of the court.

The question is, whether the death of the assured has, by the finding of the jury, been brought within the proviso, whereby the policy is made void in the several cases therein enumerated; and it appears to me, upon the proper construction of the words of that proviso, the death of the assured has not been found by the jury to fall within any of the exceptions contained in the proviso, and consequently that it is a death covered by the policy itself.

It is to be observed, that the words of the proviso are the words, not of the assured, but of the insurers, introduced by themselves for the purpose of their own exemption and protection from liability; both in reason and good sense, therefore, no less than upon acknowledged principles of legal construction, they are to be

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, in order to arrive at, and give effect to the real
:ion of both the parties: and, as the result of the
ıg of the jury is, that the assured killed himself
:ionally, but not feloniously, the short question
ə us becomes this, whether the defendant can make
or it lies on him to establish the affirmative) that
ɜath of the assured under those circumstances falls
ı the meaning of the words in the proviso "dying
own hands." And it appears to me that he can-
ɔut that, looking at the words themselves, and the
:t and position in which they are found, *a felonious*
of himself, and no other, was intended to be ex-
from the policy. The words of the proviso are,
ıe assured shall die by his own hands, or by the
of justice, or in consequence of a duel." Three
ɔf death, therefore, are manifestly intended to be
ted from the protection of the policy — a dying by
ɒn hands, a dying by the hands of justice, and a
in consequence of a duel; the word "die" being
ɛed to the first member of the sentence only, and
ɒiding and governing the three cases therein spe-
. Now, the dying in consequence of a duel is a
; in consequence of a felony then in the very act or
ıe of being committed by the assured; the dying by
ands of justice is a dying in consequence of a felony
ously committed by him (*a*); and it appears to me,
the acknowledged rule of construction, viz. *nos-*
a sociis, that the dying by his own hands, the first
ɔer of the same sentence and the third excepted
should, if left in doubt as to its meaning, be
ɒed by the same condition as the other two, and

(*a*) Suppose the attainder to
ɛrsed upon error brought
: heir or executor of the
executed, the party would
ıave died by the *hands of*
:; but it would hardly be contended that, through this wrongful act, *in invitissimum*, his family were also to be deprived of the benefit of a contract entered into by him for their behoof.

is, in fact, no more than the translation of the word of *Latin* origin — "suicide:" exception had run in the terms "shall di or by the hands of justice, or in consequen surely no doubt could have arisen that a felo was intended thereby; and, if so, ought a struction to prevail because the *English* ter the policy instead of the *Latin?*

Looking, therefore, to the words of tl think they should, in legal construction, except the case of felonious self-destruction the assured, and no other.

As to the finding of the jury, taking both finding together, perhaps we are not at lib any other conclusion from it than that the j say that there was no felonious killing of hi assured: it is not, perhaps, to be taken verdict that the deceased was *non compos* time the act was committed; for, if the meaning of the jury, the case would ther within that description which was admitt argument to be without the reach of the the case of death inflicted on himself by the under the influence of frenzy, delusion But, although the jury inform the judge, i his question, "that, at the time of committ

charged was, at the time, *compos mentis* or not, it may be too much to say that such answer of the jury necessarily infers that they thought him insane; particularly when coupled also with their declaration that the act was committed voluntarily and intentionally. I draw, therefore, no other conclusion from the finding than that it expresses the opinion of the jury that the act was not feloniously done; and, unless this was the meaning of the jury by their answer, excluding as it does the *malus animus*, that is, the essential characteristic of felony, I am unable to discover what meaning they had.

I therefore found the opinion at which I have arrived in this case upon the consideration that the insurers intended by the proviso to confine their exemption from liability to the case of felonious suicide only; that, if they intended the exception to extend both to the case of felonious self-destruction and self-destruction not felonious, they ought so to have expressed it clearly in the policy; and that, at all events, if they have left it doubtful on the face of the policy whether it is so confined or not, that doubt ought, in my opinion, to be determined against them; for it is incumbent on them to bring themselves within the exception, and, if their meaning remains in doubt, they have failed so to do.

It appears, therefore, to me that the judgment in this case ought to be given for the plaintiff: but, whilst I express this as my opinion, it is with a proper degree of distrust when I perceive it is at variance with that of my three brethren, for whose judgment I entertain a most sincere respect and deference. I am bound, however, to deliver my own judgment as I have formed it; and I have, at least, the satisfaction of knowing, that, in the present instance, if I have arrived at an erroneous conclusion, it can occasion no injury.

Rule discharged. (*a*)

(*a*) No distinction appears to have been taken in this case between *criminal* and *civil* liability. If an insane person

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Sir *T. Wilde* Serjt. then prayed that the case might be turned into a special verdict, although no leave had

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kills a man, he is not criminally liable; but if he slaughters his neighbour's sheep, he is liable in damages, to the owner. *Quære*, whether he would be liable for the consequential damage, to an insurance office which had paid the amount of a policy on the life of a person killed by him.

Although the heir of a person of non-sane memory may be relieved against the alienation of his insane ancestor; *Litt. s.* 405., *Co. Litt.* 247. *a.*; and the executor may avoid his contracts; *Faulder* v. *Silk*, 3 *Campb.* 126.; it has frequently been held, that he himself cannot avoid acts done by him, or discharge himself from liability to perform his engagements, on the ground of mental imbecility, (see *Baxter* v. *The Earl of Portsmouth*, 5 *Barn. & Cresw.* 170., 7 *Dowl. & Ryl.* 614., 2 *Carr. & P.* 180.; *Sentance* v. *Poole*, 3 *Carr. & P.* 1.; *Browne* v. *Joddrell*, *Mood. & Malk.* 105., 3 *Carr. & P.* 30.,) except where a fraudulent advantage has been taken of his imbecility; *Levy* v. *Baker*, *Mood. & Malk.* 106. *n.*

Upon indictments and other proceedings of a criminal nature, the *intention* with which the party accused committed the act proved against him, is the sole test of his amenability to criminal justice. But in an action of trespass and other *civil* proceedings, if the act be one which the law prohibits, the damage sustained by the party injured, and not the intention of the party who does the injury, is the only proper subject of inquiry, with the exception perhaps of the few cases in which *vindictive* damages are allowed to be given. See *Mann* v. *Keeling*, 12 *Mod.* 332.; *Fonblanque's Treat. Eq.*, 5th ed., 47, 48. This distinction, which may perhaps be applicable to a case of injury to others resulting from self-destruction, appears to be well laid down in the case of *Weaver* v. *Ward*, Hob. 134., which is thus reported.

"*Weaver* brought an action of trespass of assault and battery against *Ward*. The defendant pleaded that he was, amongst others, by the commandment of the lords of the council, a trained soldier in *London*, of the band of one *Andrews*, captain, and so was the plaintiff; and that they were skirmishing with their musquets with powder for their exercise *in re militari*, against another captain and his band; and as they were so skirmishing, the defendant *casualiter et per infortunium, et contra voluntatem suam*, in discharging of his piece, did hurt and wound the plaintiff; which is the same, &c.; *absque hoc*, that he was guilty *aliter, sive alio modo*. And upon demurrer by the plaintiff, judgment was given for him; for though it was agreed, that if a man tilt or turney in the presence of the king, or if two masters of defence playing their prizes, kill one another, that this shall be no felony; *or if*

ren for such an application. He referred to . *Gwynne* (*a*), where a special case was turned ecial verdict (*b*) upon the application of the de- although opposed on the part of the plain-

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ll a man or the like, elony must be done *mico;* yet in *trespass,* ads only to give *da-* ording to hurt or loss, o; *and, therefore, if hurt a man,* he shall able in trespass: and no man shall be ex- a trespass (for this is ture of an excuse, and stification *prout ei bene* cept it may be judged ithout his fault."

ose v. *Andrews*, *Cro.* it was held that an is not excused from non law responsibility fe custody of the goods est, by reason of his non-sane memory. *Dickenson* v. *Watson*, 205.; *Underwood* v. 1 *Stra.* 596.; *Kernot* an, 2 *T. R.* 390.; *Verney*, 4 *T. R.* 121. *Bingh.* 544.; 2 *Moo.* 540.

wynne v. *Burnell*, 2 7.; 2 *Scott*, 16.

1 *Collins* v. *Gwynne*, ial case, which had led by *Alderson* J., be- m the cause had been the *London* sittings *inity* term 1831, was n this court in *Easter W.* 4. (1832). The ok time to consider of dgment, and in *Hilary W.* 4. (17th *January* 1833), judgment was pronounced for the plaintiff.

The verdict having been entered on record, and judgment signed, upon the special case, *Wilde* Serjt., in *Easter* term, 3 *W.* 4. (27th *April* 1833), moved for leave to set aside the judgment and verdict, and to turn the special case into a special verdict, in order to enable the defendant to take the opinion of a court of error.

The application was supported by the following affidavit of the defendant.

"*Lawrence Gwynne* of &c. maketh oath, and saith that *Richard Bigg* was a collector of taxes for the parish of *Bethnall Green, Middlesex,* for the year ending the 5th of *April* 1828, and, at the expiration thereof, was a defaulter to the amount of 693*l.* And this deponent saith that notwithstanding such default, he was re-appointed collector for the following year; and this deponent then, for the first time, became one of his sureties; but no notice was given him of the deficiency in the former year. And this deponent further saith that he has been informed, and believes that the commissioners of the said district did not, during any part of the said years of collection, examine the said *Richard Bigg,* upon oath or otherwise, as to the state of his

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A rule nisi was granted; but the cause was ultimately compromised.

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accounts, nor did they make any order for payment to the receiver general, nor did they sell his property, but allowed the same to be sold by public auction, notwithstanding, as this deponent has been informed by *Thomas Botright*, a collector of taxes for the parish of *Shoreditch*, that he, the said *Thomas Botright*, about a week before the sale by auction of the said *Richard Bigg's* goods, did attend the board of commissioners sitting in *Osborn Street*, and delivered to Mr. *Charles Lush*, the senior clerk to the said commissioners, who was sitting by Mr. *Collins*, the chairman, and one of the plaintiffs, a printed catalogue of such intended sale by auction, and recommended him to look out. And this deponent saith that at the trial of this cause, the learned judge submitted the following questions to the jury, who returned their verdict thereon in writing as hereinafter mentioned. First, whether *Richard Bigg* paid over to the receiver general the whole sum collected by him upon the accounts of the years 1828 and 1829. Secondly, whether he paid those sums all to the account of 1828 and 1829, or, if not, how much of these sums did he pay to the account of the preceding year or years. Thirdly, whether he had any lands or houses after the default made, which could have been seized and sold, and the value. Fourthly, goods in like manner, and value. Fifthly, whether the commissioners had notice that *Bigg* had these lands or goods. Sixthly, whether *Bigg* absconded. Seventhly, whether any fraudulent misrepresentation that *Bigg* had truly collected and paid over the sums assessed in former years, was made to Dr. *Gwynne*, whereby he was induced to enter into the bond. — We find, first, that *Richard Bigg* paid over to the receiver general all the sums received by him for the assessment of the years 1828 and 1829. Secondly, that he did not pay all these sums to the service of the years 1828 and 1829, and that the sum of 2430*l.* was paid to the service of that year, and 693*l.* to that of former years. Thirdly, that *Richard Bigg* had lands or houses after the default, of the value of 121*l.*, which could have been seized and sold. Fourthly, that he had goods in like manner of the value of 200*l.* and upwards at the time of default, which could have been seized and sold. Fifthly, that the commissioners had not notice of the possession of houses or lands on the part of *Richard Bigg*, but they had reasonable grounds for believing that he possessed household goods at the time of the default. Sixthly, that he absconded. Seventhly, that no fraudulent misrepresentation was made to Dr. *Gwynne* by the commissioners to induce him to execute the bond. Whereupon the learned judge directed a verdict to be entered for the defendants, and [illegible]

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e plaintiffs would be at to move the court there- d also stating that the n would be open to the upon a special verdict, hat effect, to which no n was made. And this nt further saith, that no was made upon the re- the proceedings at nisi And this deponent fur- th, that in the following ings term the plaintiffs' moved to set aside the and enter a verdict for intiffs, upon which the rected a special case to be etween the parties; upon after hearing counsel on les, the court pronounced nt, in last *Hilary* term, g that judgment should red for the plaintiffs for a of 693*l.* on the third And this deponent hat the record thereupon ip, does not contain the findings of the jury, a the contrary, all the are there found for the ffs. And this deponent saith, that he has sued writ of error in this but he is advised, that, the judgment of the e turned into a special , he will not be enabled ecute his appeal. And, this deponent saith, that sessment has taken place ant of the deficiency in e, notwithstanding the f time that has taken and this deponent has eason for believing that ounts have passed the ffice, and are returned e Treasury, and that it ntended to re-assess the in question.

The court granted a rule nisi, which was drawn up in the following terms: —

In the Common Pleas.

Collins and others v. *Gwynne*, *Saturday*, 27th of *April*. Upon reading the affidavit of *Lawrence Gwynne*, Esq., the defendant, It is ordered, that the plaintiffs, upon notice of this rule, to be given to them or their attorney, shall shew cause to this court, on *Wednesday* next, why the judgment and the entries of the verdicts upon the several issues in this cause, should not be set aside, and why, instead thereof, a *special verdict* should not be entered, or why the verdicts found upon the several issues, should not be entered according to the notes of the judge who tried this cause; and why the defendant should not have six days to transcribe the record after this rule shall have been disposed of.

In the same term after cause had been shewn by *Taddy* Serjt. for the plaintiffs, and *Wilde* Serjt. had been heard for the defendant, the rule was made absolute in the following terms: —

In the Common Pleas,

Collins and others v. *Gwynne*, *Wednesday*, 8th of *May*. Upon reading a rule made in this cause on *Saturday*, the 27th day of *April* last, and upon hearing counsel on both sides, it is ordered that the judgment signed upon the *postea* in this cause, be set aside, and the roll and *postea* amended, by entering thereon a special verdict, to be settled by the Honourable Mr. Justice *Alderson*; each

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party to be at liberty to submit to the said Mr. Justice *Alderson* the form of the said verdict: and it is ordered that the time for the defendant to transcribe the record in this cause be hereby enlarged until six days after the same shall have been perfected by the entry of final judgment upon the special verdict hereinbefore mentioned.

It has been considered necessary to set out the rules and the affidavit upon which the rule nisi was obtained, because the arguments of counsel are not given by any contemporaneous reporter, and the decision appears to be of considerable importance, as shewing that the court has exercised the power of directing an entry upon the record of the finding of the jury, although that finding had originally taken the form of a special case; and also because in reporting the argument in the Exchequer Chamber upon the special verdict brought then by writ of error, one report states that the rule was made absolute *by consent*; 2 *Scott*, 332.; while Mr. *Bingham*, in his report of the case in error, passes over in silence all the circumstances attending the alteration of the special case into a special verdict.

It was not likely that the plaintiffs' counsel would *consent* to reopen the case, after a decision by which his clients had obtained judgment for 693*l.* and their costs of suit. The necessity for the strenuous resistance made by *Taddy* Serjt. to the defendant's application, was evidenced by the circumstance that the decision which he had to support was contrary to the impression entertained by the learned judge who tried the cause, and that, although the judgment of the court of Common Pleas was affirmed by a majority of four judges against three in the Exchequer Chamber, it was finally reversed in the House of Lords; 1 *West's Reports, in Dom. Proc.* 342.

And see 7 *Bingh.* 423.; 9 *Bingh.* 544.; 2 *New Cases*, 7.; 6 *New Cases*, 453.; 5 *Moore & P.* 276.; 2 *Moore & Scott*, 640. 775.; 1 *Scott, N. R.* 711., *antè*, Vol. I. 938., *antè*, Vol. III. p. 374. n.

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May 11.

)*MPAS* Serjt. on a former day in this term (3d *May*) obtained a rule calling upon the plaintiff and the sheriff of the county of *Montgomery*, respectively, to shew cause, why the defendant should not be discharged forthwith out of the custody of the said sheriff, and why the plaintiff and the said sheriff, or one of them, should not pay to the defendant or his attorney the costs of, and occasioned by, the application.

The application was made under the 5 & 6 *Vict. c.* 116. *s.* 1.), upon the affidavits of the defendant, his attorney, and the agent of such attorney.

An interim order by a commissioner of bankrupt for the protection of an insolvent (under 5 & 6 *Vict. c.* 116. *s.* 1.) if in the form prescribed in the rules promulgated by the judges and commissioners of the court of bankruptcy (under *s.* 13.) is sufficient, and need not shew on the face of it the jurisdiction of the commissioner to make such order.

The defendant having been arrested after such an interim order had been in fact made (but before notice to the sheriff or the plaintiff), this court ordered his discharge, although the jurisdiction of the commissioner did not appear, either by the order itself or the affidavits upon which the application to this court was made; and they refused to give costs against the sheriff or against the plaintiff.

Sect. 1., after reciting that it is expedient to protect all process against the person such persons as have become indebted without any fraud or wilful or culpable negligence, so nevertheless their estates may be duly distributed among their creditors," enacts, "that, if any person, not being a trader within the meaning of the statutes now in force relating to bankrupts, or any person being such trader, but owing debts amounting in the whole to less than 300*l.* shall give notice, according to the schedule to this act annexed, to one-fourth in number and value of his creditors, and shall cause the same notice to be inserted twice in the *Gazette* and twice in some newspaper circulating within the county wherein he resides, he may present a petition for protection from process to the court of bankruptcy, if he has resided twelve calendar months in *London* or within the *London* district, or to the commissioner of bankrupt in the country within whose district he may have resided twelve calendar months, which petition shall have annexed to it a full and true schedule of his debts, with the names of his creditors, and the dates of contracting the

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The affidavit of the defendant stated that he had duly petitioned the district court of bankruptcy at *Liverpool* that his estate might be administered and that he might

debts severally; the nature of the debt, and the security (if any) given for the same, and also of the nature and amount of his property, and of the debts owing to him, with their dates, and the names of his debtors, and the nature of the securities (if any) which he may have for such debts, and which petition shall also set forth any proposal which he may have to make for the payment, in whole or in part, of his debts; and it shall thereupon be lawful for the judge or commissioner of the court of bankruptcy to whom, by any order of the court, as hereinafter provided, the same shall be referred, or for the commissioner in the country to whom the petition shall be presented, to give, upon the filing of such petition, a protection to the petitioner from all process whatever, either against his person or his property of every description, which protection shall continue in force, and all process be stayed until the appearance of the petitioner in court, as hereinafter provided; and upon the presentation of any such petition all the estate and effects of the petitioner shall forthwith become vested in the official assignee, who shall be nominated by the commissioners acting in the matter of the said petition; and such official assignee shall and may forthwith take possession of so much thereof as can be reasonably obtained and possessed without suit; and the said official assignee shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects under and by virtue of the statute relating to bankrupts."

Sect. 2. provides "that nothing herein contained shall be held or construed to hinder or prevent the said insolvent from being arrested or held to bail under the authority of any judge's order for that purpose, in like manner as may now by law be done, notwithstanding any protection which may be granted under the authority of this act."

Sect. 13. enacts, "that it shall be lawful for the judges and commissioners of the court of bankruptcy, or any four of them, to make such orders, rules and regulations as they shall think fit for the better carrying this act into execution, and particularly for regulating and appointing the duties of the official assignees and of the other assignees; the auditing of their accounts; the collecting the debts and the realising the estate and effects of the petitioner; and the notification of the time of hearing petitions or motions in the *Gazette* or otherwise; which orders, rules and regulations shall, upon being approved by the Lord Chancellor, Lord Keeper or Lords Commissioners of the Great Seal, be laid before both houses of parliament within

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be protected from process pursuant to the statute; that he had duly obtained the interim order for protection, bearing date the 24th of *April* 1843; that he was on the 17th of *April* taken in execution under a ca. sa. at the suit of the plaintiff, and that he was then a prisoner in the custody of the sheriff of *Montgomery*.

The affidavit of the defendant's attorney stated that the defendant, having been resident twelve months within the jurisdiction of the *Liverpool* district court of bankruptcy, and having given the requisite notice of his intention to present his petition, and that the time when the petition should be heard was advertised in the *London Gazette* and in the newspapers in the notice mentioned, to one fourth in number and value of his creditors; and having caused the same notice to be inserted twice in the *London Gazette*, and twice in a newspaper circulating in the county in which the defendant resided; the deponent, as attorney for the defendant, on the 24th *April* attended the said district court with the defendant's petition and schedule; a copy of the notice, with affidavit of the due service thereof; two numbers of the *London Gazette*, and two numbers of the said newspaper, containing the insertion of the said notice respectively, and with an affidavit of the defendant's signature to the petition and schedule; whereupon the court examined the same, and being satisfied as to the correctness of the petition, and of the said several paper writings, and that the notices and advertisements had been given according to the statute, directed the said petition and

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fourteen days from such approval, if parliament be then sitting, or if not, within fourteen days from the commencement of the next session of parliament, and shall in the mean time, and from the date of such approval, be binding upon the commissioners in the country, and upon all other persons whatever, until such time as either house of parliament shall make some resolution in whole or in part disapproving the same."

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writings to be filed in the said district court; and the deputy registrar filed them accordingly; and the court thereupon nominated an official assignee, and appointed the 26th of *May* for the first examination of the defendant; and *C. P.* Esq., one of the commissioners for the said district court, thereupon granted and allowed an interim order for the defendant's protection; and that a true copy of the defendant's intention to present his petition to the said district court was, on the 17th *April*, delivered to the plaintiff.

A copy of the petition was annexed to this affidavit, as follows: —

"To the *Liverpool* District Court of Bankruptcy.

"The humble petition of *Jeremiah Woolley*, the younger, of *Wigdwr*, in the parish of *Llandinam*, in the county of *Montgomery*, farming bailiff, heretofore a farmer,

"Sheweth,

"That your petitioner is not a trader within the meaning of the statutes now in force (*a*) relating to bankrupts:

(*a*) These are the words of the 5 & 6 *Vict. c.* 116. *s.* 1. But the word "now" in the statute would, in strictness, refer to the day on which the bill received the royal assent, viz. 12th of *August*, 1842; whereas the word "now" in the petition would apply to the laws in force at the time the petition was signed. The commissioners of bankruptcy have held that a party is entitled to the benefit of the act, who, although he does not carry on any trade which was within the *former* statutes of bankruptcy, does carry on a trade within the 5 & 6 *Vict. c.* 122. inasmuch as that statute, though it received the royal assent on the same day (the 12th of *August* 1842), did not come into operation until the 11th of *November* following. According to this construction of the statute, the language of the petition should not have been, "now in force," but "which were in force at the time of the passing of a certain act of parliament, made &c. and intituled, &c. But by the 7 & 8 *Vict. c.* 96. a form of petition is given containing the words "the statutes *now* in force; the truth of the allegations in which petition must, as before, be verified by the affidavit of the

hat your petitioner has resided twelve months (*a*) the district of this honourable court, that is to say, *dwr*, in the parish of *Llandinam*, in the county of *omery*:

hat your petitioner has become indebted, without ıud or gross or culpable negligence, to divers cre- whose names are inserted in the schedule marked this his petition annexed:

hat your petitioner has given notice to one fourth ıber and value of such creditors, that is to say, to 'eral creditors to whose names the word '*notice*' is :d in the said schedule, of his intention to present tition, and has caused notice thereof to be inserted n the *London Gazette*, that is to say, on *Friday* :th day of *April*, and *Tuesday* the 18th day of instant, and twice in the *Shrewsbury Chronicle* ıper, that is to say, on *Friday* the 14th day of and *Friday* the 21st day of *April*, instant; as by d gazette and newspapers will appear (*b*):

ɛr. This seems to be unt to an enactment party to be discharged ıat act, must be a person ıot a trader within the ; of the acts which are ation at the time the is presented.

The petition here follows ds of the statute 5 & 6 76. *s.* 1. but in the form on given in the schedule ds are "months *past*," ; probably, "months t." The statement in tion would appear to be by a residence during twelve months of the r's life, or, as it appears been held at *Basing-* ɛst, by a residence of twelve months at various intervals.

(*b*) Notice is not required to be given to the *detaining creditor*; though it *is* required to be given to one fourth of the creditors in number and value, of the debtor's selection. That notice has been given to the creditors mentioned in the petition, rests, however, upon the assertion of the petitioner, the truth of which cannot be inquired into until after his discharge, nor then, unless he choose to appear, when the period mentioned in the interim order,—or, in other words, during which his person and goods are protected against all process,—has elapsed.

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"That the schedules marked respectively &c. to this petition annexed, contain a full and true account of your petitioner's debts, with the names of his creditors, and the dates of contracting the debts severally, the nature of the debt, and the security (if any) given for the same, and also the nature and amount of his property, and of the debts owing to him, with their dates, and the names of his debtors, and the nature of the securities (if any) which he has for such debts:

"That your petitioner, being unable to pay and satisfy such debts, is desirous that his estate should be administered under the protection and direction of this honourable court:

"That your petitioner is ready and willing to be examined from time to time touching his estate and effects, and to make a full and true disclosure and discovery of the same:

"Your petitioner therefore prays that your petitioner may be protected from all process whatever, either against his person or his property of every description, and that your petitioner may have such further and other relief as by the statute made in the parliament holden in the fifth and sixth years of the reign of Her present Majesty, intituled &c., is provided, and this honourable court shall think fit.

"And your petitioner will ever pray, &c."

The affidavit of the agent stated that he did, on the 27th of *April*, after the defendant had been arrested, but before he was taken to prison, personally serve the sheriff's officer, or bailiff, making the arrest, and also the plaintiff, with true copies of the said interim order, at the same time producing the original; and that after such service he demanded the discharge of the defendant, but that the sheriff's officer refused to discharge him; and that he requested the plaintiff to give his authority

for such discharge, but that the plaintiff refused to do so, and said he would place every obstacle that he could in the way of the defendant's obtaining the benefit of his petition under the act.

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A copy of the interim order was annexed to this affidavit, as follows:—

"In the *Liverpool* District Court of Bankruptcy.

"At *Liverpool*, the 24th day of *April* 1843.

"In the matter of the petition of *Jeremiah Woolley* the younger, of *Wigdwr*, in the parish of *Llandinam*, in the county of *Montgomery*, farming bailiff, heretofore a farmer, an insolvent debtor.

"Be it remembered, that the above named *Jeremiah Woolley* having presented a petition to this honourable court, under the provisions of an act of parliament passed in the parliament holden in the fifth and sixth years of the reign of Her present Majesty, intituled "An Act for the Relief of Insolvent Debtors," and such petition having been this day filed in court, a protection is hereby given to the said *J. W.* from all process whatever, except as hereinafter mentioned, either against his person or his property of every description, which protection shall continue in force, and all process (except process for arresting or holding him to bail under the authority of a judge's order for that purpose) be stayed, until the 26th day of *May*, at 11 o'clock in the forenoon, being the time appointed for the appearance of the said *J. W.* at the *Liverpool* District Court of Bankruptcy at *Liverpool*, and for the first examination of the said *J. W.* according to the form of the said act.

(Signed) *C. P.*, Commissioner."

Manning Serjt., on a subsequent day (9th *May*) shewed cause, and *Bompas* Serjt. was heard in support of the rule.

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Their arguments are so fully stated and commented upon in the judgment of the court, that it is not necessary to repeat them here.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

This was a rule calling upon the plaintiff and the sheriff of the county of *Montgomery* to shew cause why the defendant should not be discharged out of custody, and why the plaintiff and the sheriff, or one of them, should not pay the costs of this application. The rule was obtained upon affidavits stating that the defendant had by petition (a copy of which is annexed to one of the affidavits) applied to the *Liverpool* District Court of Bankruptcy, praying that his estate might be administered, and that he might be protected from all process, according to the provisions of the statute 5 & 6 *Vict. c.* 116.; and that, upon filing his petition, he had duly obtained the interim order of protection, also annexed to the affidavit. This interim order, bearing date the 24th of *April* 1843, after reciting that the defendant had presented a petition to that court under the provisions of the statute, and that such petition had been filed, gives a protection to the defendant from all process whatsoever (except process to hold to bail under a judge's order), and directs that such protection shall continue in force, and that all process shall be stayed, until the 26th of *May* then next, being the time appointed for the defendant's appearance and examination at the District Court of Bankruptcy, according to the form of the act. The affidavit further states, that the defendant was afterwards, on the 27th of *April*, taken in execution by the sheriff of *Montgomery*, under a writ of *capias ad satisfaciendum*, at the suit of the plaintiff *Marsh*; and that the interim order of protection was afterwards

produced, and a copy of it served upon the sheriff's officer, who was thereupon required to release the defendant out of custody, but refused to do so; and that the plaintiff, upon application afterwards made to him for an order for the defendant's release, refused to interfere; and that the defendant still remained in the custody of the sheriff.

Upon these affidavits four questions have been raised for our decision: — first, whether the interim order of protection is good upon the face of it, without shewing the authority of the commissioner to issue it; secondly, whether the affidavits sufficiently disclosed the commissioner's jurisdiction; and, if not, thirdly, whether the court ought to order the defendant to be discharged without proof of the commissioner's authority; and, fourthly, upon what terms the defendant ought to be discharged.

Upon examining the order itself, we find in it no statement of those circumstances which, according to the provisions of the statute, are necessary to give the commissioner authority to grant any such protection. There is no statement that the defendant was not a trader; nor that, being a trader, his debts amounted to less than 300*l.*; nor that he had given any of the notices required by the statute; nor that he had resided twelve months within the *Liverpool* district: but the order merely recites that the defendant had presented a petition under the provisions of the statute, which had been filed in court, without any finding that the statements in the petition were true; and then proceeds to grant the protection, as already stated.

The *petition* does, indeed, allege all these circumstances; but the statute does not enact that if any person shall present a petition stating that he is not a trader, and so on, the commissioner may thereupon give an order of protection; but it confers the power on the commissioner only in cases where such petition shall be pre-

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sented by a person not a trader, or by a trader owing less than 300*l.*, and where the petitioner has resided twelve months within the particular district, and has given the prescribed notice to his creditors.

As this, therefore, is an order under a special statutory power, it is essential to the validity of such order that every thing that is necessary to give jurisdiction should appear on the face of it, unless the legislature has given some more compendious form. (See the cases of *Muskett* v. *Drummond* (*a*), and *Christie* v. *Unwin* (*b*).) And as there is nothing on the face of this order, either by way of direct allegation or of recital, to shew that the defendant was a person to whom the commissioner had authority to give any protection under the statute, the order would be clearly bad, unless some legislative provision could be pointed out which had sanctioned the adoption of this form.

It was argued for the defendant, that the order was in the form prescribed by certain rules and orders made under the thirteenth section of the statute by the late Sir *John Cross*, one of the judges, and four of the commissioners, of the court of Bankruptcy, and approved of by the Lord Chancellor; and that the legal effect of the rule prescribing this form, would be the same as if the form had been given in a schedule to the act itself.

By the thirteenth section of the statute, power is given to the judges and commissioners of the court of Bankruptcy, or any four of them, to make such rules as they shall think fit for the better carrying that act into execution. It then directs that such rules shall, upon being approved of by the Lord Chancellor, be laid before both houses of parliament, and enacts that such rules shall, in the mean time, and from the date of such

(*a*) 10 *B. & C.* 158; 5 *M. & R.* 210. (*b*) 11 *A. & E.* 373; 8 *P. & D.* 204.

pproval, be binding upon the commissioners in the ountry, and upon all other persons whatsoever, until uch time as either house of parliament shall make ome resolution disapproving of the same.

It appears that certain rules were made by the judges nd commissioners of the court of Bankruptcy, and ere approved by the Lord Chancellor, and that by he sixth of those rules, it was ordered that the pro- ection from process, to be given to any petitioner from ling his petition, shall be called the interim order for rotection, and shall be in the form set forth in the chedule A. No. 2, annexed to those orders. Upon re- erring to the Schedule A. No. 2., we find the form of he interim order, corresponding in every respect with hat which is now under consideration. And the first uestion resolves itself into this,—whether the thirteenth ection conferred upon the judges and commissioners of he court of Bankruptcy the power of prescribing this orm for the order of protection, and thereby dispensing vith the ordinary rule of law, which requires that an rder made under special statutory authority shall state uch facts as are necessary to warrant its being issued.

There is certainly no express authority to prescribe ny such form; and none of the special objects par- icularised in the thirteenth section have any relation to uch an order. But the terms of general authority to nake rules for the better carrying that act into exe- ution are large enough to include the power that has een exercised; and, when the provisions of this statute re closely examined, it will be found that it was neces- ary to prescribe some special form in order to carry he act into execution; for, if the commissioner could ive no interim protection without stating the facts ecessary to give him jurisdiction, he must either affirm, ithout any investigation, the facts alleged in the peti- ion to be true, or he must wait till he had ascertained

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their truth upon inquiry, and thus delay the protection, which was intended to be immediate, and anticipate a great portion of the investigation, which, according to the statute, is to take place at the termination of the interim protection at the first examination of the insolvent. As the expediency of such a form of order, therefore, is apparent, and the words of the statute are large enough to warrant it, we think the order in question must be considered as sanctioned by the legislature, and that therefore no objection can be made to it on the ground that it does not sufficiently shew the authority of the commissioner to make it.

The next question will be, whether the court ought to direct the defendant to be discharged out of custody without requiring him to make out, by affidavit, the authority of the commissioner to grant him the protection under which he seeks his release. And we think we ought; because, although the sheriff must stand excused for the arrest, as the order was not produced at the time of the arrest, yet it now appears that the order had been in fact issued some days before; and the statutory stay of process operates from the date of the order; and, if we were to require proof of the commissioner's authority, the whole object of the legislature might be defeated; for, upon examining the provisions of the statute, we can see that it was intended that this temporary protection should be afforded to petitioners upon their subjecting their property to seizure by the official assignee, and before the investigation of the truth of their petitions. But if we were to require the petitioner to prove, by affidavit, the jurisdiction of the commissioner, we could not refuse to receive affidavits on the other side; and thus we should be instituting, in this court, an inquiry which the legislature intended should be postponed until the time fixed for the first examination before the

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missioner (*a*); for the statute does not require, or authorise, the commissioner to receive any proof, by davit or otherwise, of the truth of the petition, before t time. We think that it is enough for the defend- to shew that the order for protection was issued ore the day of the arrest. It is unnecessary, there- for us to make any further remarks on the many cts in the present affidavits, which were pointed out he course of the argument.

The only remaining question is, upon what terms the ndant ought to be released. He asks, that either plaintiff or the sheriff shall pay the costs of this lication. Such a term it would be manifestly unjust mpose upon the sheriff, who was ignorant of the tence of the order of protection at the time of the st, and who, if he had afterwards released his oner upon the production of the order, might have lered himself liable to an action for an escape if it eventually appeared that the commissioner had no sdiction to grant the protection: for, as the object of legislature seems to have been to afford protection m subsequent arrest, and not to release debtors al- dy in custody, it has provided no indemnity for the eriff in such a case as the present. And it is difficult see how the sheriff could defend himself in an action for an escape, if the statements in the defendant's petition should eventually prove to be untrue. This difficulty is provided for by the 117th section of the statute 6 *G.* 4. c. 16. in the case of bankrupts, and by the eighty-first section of the 7 *G.* 4. *c.* 57. in the case of insolvents (*b*);

(*a*) To which examination the petitioner is not bound to subject himself, where he has reason to apprehend that any of the statements in the petition, upon which he obtained the interim order, and which gave him the opportunity of placing himself beyond the reach of his creditors, and of withdrawing from the jurisdiction of the commissioner who granted the order, will be disproved.

(*b*) Re-enacted by 1 & 2 *Vict. c.* 110. *s.* 110.

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and the peril in which a sheriff would be placed by discharging an insolvent, even under the general power given to the commissioner by the latter act, without the protection of such a clause of indemnity, is pointed out by the judges of the court of Queen's Bench, in the case of *Saffery* v. *Jones* (*a*); a peril which would be much more obvious in this case, where no power is given to the commissioner to order the discharge of an insolvent already in custody. If the order had been produced at the time of the arrest, the question might have assumed a different character.

With respect to the plaintiff, he seems to have been also ignorant, at the time of the arrest, that any order of protection had been obtained by the defendant; and, indeed, it does not appear that the order had at that time reached the defendant; and, when the plaintiff was afterwards applied to for an order to liberate the defendant, he was placed in this difficulty — that, if he had given the order, and the defendant had been liberated, and had afterwards failed to make out the allegations in his petition, the commissioner's order would have been void; and the liberation of the defendant by the act of the plaintiff would have been a bar to all future remedies under his judgment. The plaintiff had issued his process in the usual course; and he was not bound to interpose, and to decide whether the defendant was entitled, or was not entitled, to his release.

We are therefore of opinion that the rule for the discharge of the defendant out of custody should be made absolute, but without costs.

Rule absolute accordingly. (*b*)

(*a*) 2 *B. & Ad.* 598.

(*b*) And see the 7 & 8 *Vict. c.* 96., amending the 5 & 6 *Vict. c.* 116. but which also makes no provision for ascertaining, previously to the discharge of the petitioner, the truth of the allegations contained in the petition.

See also remarks on these statutes in the *Law Review* for *November*, 1844. (No. I.) Art. XIV.

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HUNT v. EADES.

May 11.

The defendant was served with a copy of a writ of summons to appear in the *Queen's Bench*, tested by the Lord Chief Justice of the *Common Pleas*. At the time of the service, and also when served with notice of declaration in the Common Pleas, the defendant said that he would see the plaintiff and arrange about paying the debt:

Held, that he thereby waived the irregularity.

HALCOMBE Serjt. on a former day in this term (21st *April*) obtained a rule calling upon the plaintiff to shew cause why the affidavit of service of the writ of summons, the appearance entered by the plaintiff, the notice of declaration, and all subsequent proceedings, should not be set aside.

It appeared from the affidavits upon which the rule was obtained, that on the 3d of *April*, the defendant was served with a copy of a writ of summons, dated the 31st of *March*, by which he was commanded to enter an appearance in the court of *Queen's Bench*, in an action on promises, and tested in the name of the Chief Justice of *this* court. An appearance was entered for the defendant in the court of Queen's Bench. (It did not appear when this was done.) On the 11th of *April* the defendant was served with a notice of declaration in this court.

Sir *T. Wilde* Serjt. now shewed cause, upon an affidavit stating that, when the copy of the writ of summons was served upon the defendant, he said he would see the plaintiff and make an arrangement for the payment of the debt. On the 11th of *April* (the same day on which the defendant was served with notice of declaration), the plaintiff caused an appearance to be entered for the defendant, in *this* court, according to the statute; on which day, the defendant again said he would see the plaintiff and arrange the payment of the debt and costs. On the 19th of *April* the defendant took out a summons to set aside the notice of declaration and all subsequent proceedings, for irregularity. This summons was attended and heard before *Maule* J. on the 20th, when it was

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dismissed without costs, upon the ground that the defendant had waived the irregularity; and at the request of the defendant, four days' further time to plead was given to him.

The learned serjeant admitted that the copy of the writ of summons was irregular; but contended that the application to set it aside should have been within the time of appearance, and before the defendant had taken any fresh step; *R. H. 2 Will. 4. r. 33.*; *Smith* v. *Clarke* (*a*), *Tyler* v. *Green* (*b*), *Child* v. *Marsh.* (*c*) [*Erskine* J. It has been decided that allowing the plaintiff to enter an appearance is not a "fresh step" on the part of the defendant, within the meaning of the *R. H. 2 Will. 4.*] (*d*). The defendant here has taken a fresh step by obtaining time to plead, whereby he has clearly waived the irregularity; and he has also done so by his promise to see the plaintiff and arrange the debt; *Rawes* v. *Knight* (*e*), *Lloyd* v. *Hawkyard.* *g*)

Halcombe Serjt. in support of the rule. The service of the copy of the writ of summons was not a mere irregularity within the *R. H. 2 Will. 4.*; it was an absolute nullity, which could not be waived. In *Hinton* v. *Stevens* (*h*), the defendant, on the 8th of *August*, was served with a copy of a writ of summons, directed to him by a wrong name; on the 30th he was served with a notice of declaration, in which he was properly described: upon an application to set aside the declaration and notice, and all subsequent proceedings, for irregularity, it was held

(*a*) 2 *Dowl. P. C.* 218.
(*b*) 3 *Dowl. P. C.* 439.
(*c*) 3 *M. & W.* 433.; 6 *Dowl. P. C.* 576. See *Fynn* v. *Kemp*, 2 *Dowl. P. C.* 620.; 4 *Tyrwh.* 990.; *Rutty* v. *Arbur*, 2 *Dowl. P. C.* 36.; *Edwards* v. *Collins*, 5 *D. P. C.* 227.
(*d*) See *Chalkley* v. *Carter*, *Tyrwh. & Gr.* 210., 4 *Dowl. P. C.* 480.; *Davis* v. *Sherlock*, 7 *Dowl. P. C.* 530.
(*e*) 1 *Bingh.* 132.; 7 *J. B. Moore*, 461.
(*g*) 1 *M. & R.* 320.
(*h*) 4 *Dowl. P. C.* 283.

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that the application was not too late, being made before the time for pleading had expired. The extended time for pleading in this case expired on the 21st, on which day the rule nisi was obtained. He also cited *Moffat* v. *Carter* (*a*), *Hill* v. *Parker* (*b*), and *Newnham* v. *Hanny.* (*c*) The mere asking for time to settle the action will not waive an irregularity; *Anon.* (*d*); nor will an acquiescence in the decision of a judge at chambers; *M'Dougall* v. *Nicholls* (*e*), *Wright* v. *Skinner.* (*g*) In *Topping* v. *Fuge* (*h*), where a plaintiff having served an irregular process, the defendant gave him notice of the irregularity, and told him that if he proceeded thereon, he, the defendant, would move to set aside the proceedings, it was held that this was an exception to the ordinary rule, that the party applying to set aside irregular proceedings must come before the other party has taken any further step in the cause.

TINDAL C.J. As regards the waiver on the part of the defendant, by promising to see the plaintiff and arrange the debt with him, I do not see how this case can be distinguished from *Rawes* v. *Knight* and *Lloyd* v. *Hawkyard.* The cases which are referred to in a note to the latter case—*Anon.* (*i*) and *Lowes* v. *Clarke* (*k*)—are also in point. Upon this ground, therefore, I am of opinion that the rule must be discharged.

COLTMAN J. The cases of *Rawes* v. *Knight* and *Lloyd* v. *Hawkyard* are founded upon reason. By a promise to pay the debt, the plaintiff is lulled into

(*a*) 2 *N. R.* 75.
(*b*) 2 *Chitt. R.* 165.
(*c*) 5 *Dowl. P. C.* 259.
(*d*) 1 *Dowl. P. C.* 23.
(*e*) 3 *A. & E.* 813.; 5 *N. & M.* 366.
(*g*) 2 *C. M. & R.* 746.; *Tyrwh. & Gr.* 69.; 4 *Dowl. P. C.* 727.
(*h*) 5 *Taunt.* 330.
(*i*) 1 *Chitt. R.* 129.
(*k*) 2 *Chitt. R.* 240.

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security, and is prevented from looking curiously into the proceedings.

ERSKINE J. concurred.

MAULE J. I agree with the rest of the court in thinking the rule should be discharged, though it may be hard upon the defendant, as he has no opportunity of answering the plaintiff's affidavit. But that cannot be helped. The irregularity in the copy of the writ of summons was waived by the promise of the defendant, which implied a knowledge on his part that a suit was pending, and that he had no defence. *Rawes* v. *Knight* is a sufficient authority upon that point. In *Lloyd* v. *Hawkyard* the judgment of the court does not appear to have proceeded on the ground of the promise or admission by the defendant. The marginal note to that case is as follows: — "Where the service of a writ is irregular, but the defendant, on receiving notice of declaration, says, 'It is all right, I will call and settle the debt and costs,' the irregularity is waived." But the court, in giving judgment, said, "The principle is a sound and plain one, that where a defendant means to take advantage of an irregularity in point of form in the plaintiff's proceedings, he must act promptly, and not, by lying by, lure the plaintiff on to incur increased expenses." So that they would appear to have decided the case upon the ground of delay, and not upon the waiver by the defendant's promise, which no promptitude on his part in applying to the court could have got over.

Rule discharged.

HAGUE *v.* HALL.

May 11.

Where a cause was entered as a *special jury* cause, but was taken in the defendant's absence and tried by a *common* jury, as an undefended cause, the court set aside the trial and verdict, with costs.

SIR *T. WILDE* Serjt,, on a former day in this term (21st *April*), applied, on the part of the defendant, to set aside the trial and verdict in this cause, and to have a new trial, with costs.

It appeared from the affidavit upon which the motion was made, that issue was joined in the cause on the 4th of *May* 1842, when notice of trial was given for the sittings for *Middlesex* after the then next *Trinity* term; that the plaintiff, on the 13th of *May*, obtained a rule for a special jury, which jury was afterwards struck and reduced, and that the cause was set down as a special jury cause; that, in consequence of the plaintiff's not having lodged the record, the cause was struck out of the paper by the marshal; that notice of trial was again given by the plaintiff on the 16th of *January* last, for the sittings after the then present *Hilary* term, and the cause was again set down as a special jury cause; that shortly afterwards the plaintiff's attorney informed the defendant's attorney that an application was about to be made on behalf of the plaintiff for leave to strike the cause out of the special jury list, and to have the same tried by a common jury, but the defendant's attorney answered that he should oppose the application, and nothing was done thereupon; that, at the sittings after *Hilary* term, the cause was the last but two in the special jury list; and that on the 9th of *February* notice was given by the court that only two special jury causes (of which this was not one) would be taken on the following day; but that on the next day the cause was called on in the absence of the defendant's attorney and of any person on the defendant's behalf, and tried by

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a common jury as an undefended cause, when a verdict was given for the plaintiff.

The learned serjeant cited *Holt* v. *Meddowcroft*. (*a*)

A rule nisi having been granted,

Channell Serjt., for the plaintiff, now admitted that the rule must be made absolute, but submitted that it ought not to be made absolute with costs.

TINDAL C. J. The words of the jury act (6 *G.* 4. *c.* 50. *s.* 30.) are very strong—that "every jury so struck shall be the jury returned for the trial of such issue." The trial was clearly irregular, and must be set aside with costs.

Per curiam;

Rule absolute.

(*a*) 4 *M. & S.* 467.

May 11.

DRIVER *v.* PEMELLER.

Writ of summons in *debt*; declaration filed, and notice thereof, in *assumpsit*. Held, that the irregularity was not waived by taking the declaration out of the office.

THE writ of summons in this case was in *debt*, and the declaration, in *assumpsit*.

Bompas Serjt., having obtained a rule nisi to set aside the declaration for irregularity,

Channell Serjt. now shewed cause, upon an affidavit, which stated that the misdescription of the form of action in the process, was a clerical error, and that the notice of declaration corresponded with the declaration itself. He admitted that the variance between the writ and the

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DRIVER v. PEMELLER.

declaration was an irregularity; but submitted that it had been waived by the defendant having taken the declaration out of the office, which was a fresh step. The notice shewed the name, and the defendant might have moved to set aside the notice; or he might have inspected the declaration without taking it out of the office. He relied upon *Gilbert* v. *Kirkland* (*a*) and *Robins* v. *Richards.* (*b*)

Bompas Serjt. in support of the rule. In the cases cited, the objection was to the notice of declaration, which would be waived by taking the declaration out of the office. But here, the objection is to the declaration itself, and of that objection there has been no waiver.

Per curiam; (*c*)

Rule absolute.

(*a*) 2 *Dowl. P. C.* 153.
(*b*) 1 *Dowl. P. C.* 378.
(*c*) *Tindal* C. J. was absent.

BICKLEY *v.* FELL.

May 11.

A RULE nisi having been obtained for judgment as in case of a nonsuit, it was afterwards (5th of *May*) discharged upon a peremptory undertaking.

A rule for judgment as in case of a nonsuit, having been discharged, the court refused to re-open it, upon the ground that the affidavit upon which it had been discharged was false.

Shee Serjt. now moved that the former rule might be re-opened, upon an affidavit stating that the excuse for not proceeding to trial, which had been sworn to when the former rule was discharged, was false. He submitted that the defendant had no opportunity, on the former occasion, in disproving the statement in the affidavit made on the part of the plaintiff.

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TINDAL C. J. The same observation might be made in any case where one party has the opportunity of swearing last. If the present application were acceded to, it would tend to endless inconvenience.

Per curiam;

Rule refused.

May 11.

Ex parte NASH.

Articles of clerkship having been entered into in *March* 1829, were subsequently stolen: the court, in *Easter* term, 1840, allowed a copy thereof to be inrolled, but not *nunc pro tunc.*

NASH had been articled to one *Miller*, an attorney, by indenture bearing date the 2d of *March*, 1829. The money for the stamp duty having been advanced by one *Anthony*, the articles of clerkship were deposited with him, and were stolen, with other property, from his house in the month of *July* following.

Dowling Serjt., upon an affidavit of these facts, now moved for leave to inrol a verified *copy* of the articles of clerkship *nunc pro tunc;* and to file an affidavit of the execution of the original articles. [*Maule* J. What is meant by *tunc?*] Three months after the execution of the articles. The learned serjeant referred to Ex parte *Clarke* (*a*), and Ex parte *Chapman.* (*b*)

TINDAL C. J. The copy of the articles may be enrolled; but not *nunc pro tunc.*

Per curiam;

Rule accordingly. (*c*)

(*a*) See 22 Geo. 2. c. 46. s. 3, 4, 9. 3 B. & A. 610.
(*b*) 3 *Dowl. P. C.* 562.
(*c*) See Ex parte *Jay*, 3 *Dowl. P. C.* 582.

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AGASSIZ and Wife *v.* PALMER. *May 6.*

A *capias* cannot issue upon a *scire facias*, on a judgment under 1 & 2 *Vict. c.* 110. *s.* 35.

AN order was made by Lord *Abinger* C. B. on the 20th of *March*, directing that the defendant should be held to bail. Upon this order a *capias* was issued, under which the defendant was taken and committed to the Queen's Bench prison.

This order was obtained on the affidavit of the plaintiff *Maria Agassiz*, which stated that, in *Michaelmas* term, 1841, before her intermarriage with the plaintiff *George Agassiz*, she recovered in this court 1000*l.* debt, and 39*l.* 18*s.* in an action upon a bond conditioned for the payment to her of an annuity of 100*l.* by half-yearly instalments — that, before judgment, there had been a suggestion of a breach in the non-payment of 50*l.* for a half year's annuity, on which breach damages had been assessed and paid; and that, since the intermarrying of the plaintiffs, a *sci. fa.* had issued to recover the judgment, and that the defendant was about to leave *England* for *India*.

April 22.

Sir *Thomas Wilde* Serjt. moved to set aside the order of the learned judge, and to discharge the defendant out of custody, contending that a judge has no authority under the 1 & 2 *Vict. c.* 110. *s.* 35. to require that a party shall be held to bail in a proceeding by *sci. fa.* (*a*).

A rule nisi having been granted,

(*a*) For this *Tidd* cites the judgment given by *Ashhurst* J. in 1 T. R. 388., executors of *Wright* Bart. v. *Nutt*, in error, where the testator having undertaken to bring no writ of error, it was held that the executors could not bring error upon the *sci. fa.* issued against them. The judgment is thus reported: — "This is not a *new action*, but a continuation of the old one. It is only a *sci. fa.* to revive the former judgment;

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Talfourd Serjt. now shewed cause. The fifth section of the 1 & 2 *Vict. c.* 110. authorizes the making of orders to hold to bail, in the manner directed by the third section, at any time before final judgment. A judgment recovered under 8 & 9 *W.* 3. *c.* 11., though in form a general judgment, is, in substance and effect, an interlocutory judgment, inasmuch as it does not terminate the proceedings. [*Tindal* C. J. In this case the *sci. fa.* is not merely to revive the proceedings and to assess further damages, it introduces a new party on the record, and appears to be, in reality, a new action.] If the defendant had been arrested in the original action, it was considered that he could not be held to bail in the new proceeding. Not having been arrested in the original action, the defendant might have been held to bail before the passing of the 1 & 2 *Vict. c.* 110.; *Bishop* v. *Powell* (*a*), *Barnes* v. *Matson.* (*b*)

Sir *Thomas Wilde* Serjt. (with whom was *Hugh Hill*), in support of the rule. The proceeding by *sci. fa.* is

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and as the testator himself, if he had lived, could not have brought a writ of error, in consequence of the agreement, neither can his executors." It is obvious that, with reference to the agreement not to bring error, the testator and his executors were one person, and the first action and the *scire facias* were one and the same proceeding. Lord *Coke* says (*Co. Litt.* 290 *b.*) "Albeit, it be a judicial writ, yet, because the defendant may thereupon plead, the *scire facias* is accounted in law, to be in the nature of an action." This observation, which agrees with the text of *Littleton*, s. 505., seems to apply as well to the writ of *scire facias*, at common law (*vide H.* 14 *H.* 7. fo. 16. pl. 5.), upon a change of parties, as to the statutory *scire facias*, given by *Westm.* 2. st. 1. c. 45. between the same parties, where no execution has issued within the year and a day, in lieu of the action of debt upon the judgment. It is observable, however, that the statute, so far from treating the *scire facias* as a new action, expressly says, "talem de cætero habeant vigorem quod non sit necesse in posterum de hiis *placitare*." And see *Grey* v. *Jones*, 2 *Wils.* 251.; *Pulteney* v. *Townson*, 2 *W. Bla.* 1227.; 2 *Wms. Saund.* 71 (4.)

(*a*) 6 *T. R.* 616.

(*b*) Cited in the judgment in *Kinnear* v. *Tarrant*, 15 *East*, 631.

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not a new action; it is a continuance of the former action, *Tidd's Practice*, 1145. (*a*) [*Tindal* C. J. The object of the *sci. fa.* in this case was to introduce a new party upon the record.] There could have been formerly no arrest upon a *sci. fa.* until the party had succeeded in obtaining an award of execution; and the statute 1 & 2 *Vict. c.* 110. does not extend the power of arrest to cases in which no arrest upon mesne profits lay before. All the provisions of that statute relate to actions commenced by writ of summons; and the fifth section expressly gives the power of making orders to hold to bail "after the commencement of *such* action;" that is, of an action commenced by writ of summons, as directed by sect. 2.

Cur. adv. vult.

May 6.

TINDAL C. J. now delivered the judgment of the court. We wished to look into the cases upon this point, and we are of opinion that this court has no power to issue a *capias*. The object of the *sci. fa.* is to call upon the defendant to shew cause why execution should not issue; and it directs the sheriff to give notice only. The sheriff had no power to take the defendant. If this was a new action, the court had no power to grant a *capias*. There was no process before the new statute, to take the party in execution; and that act, by sect. 3., gives the power of directing the defendant to be held to bail in any action "in which he is now liable to arrest." This sentence refers to the commencement of an action; because, by sect. 5., it is enacted "that any such special order may be made at any time after the commencement of the action, and before final judgment shall have been obtained therein." If this was an old action, then the fifth section shews that the learned judge had no au-

(*a*) 9th ed. 1145.; 6th ed. 1158.

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thority to direct that the defendant should be held to bail. Whether the proceeding by *sci. fa.* be treated as a new action, or as a continuance of a former one, or whether the *capias* ought not to have issued, the rule must be absolute for discharging the defendant out of custody.

Rule absolute. (*a*)

Talfourd Serjt. submitted that it was reasonable, that the defendant should be restrained from bringing an action for the arrest.

TINDAL C. J. He would hardly bring an action for an arrest made under a judge's order. But we have no power to restrain him. We are giving him only that which he has a right to claim at our hands.

(*a*) And see *Badman* v. *Pugh*, *ante*, 391. (*b*)

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In an action for defamation, either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive; but if the evidence given for that purpose establishes another cause of action, the jury should be cautioned against giving any damages in respect of such other cause of action.

CASE for a libel. The declaration, after stating as inducement that the plaintiff used and exercised the profession and business of an attorney and solicitor, and held the office of solicitor of the city of *London*, set out the libel, which was in the form of a letter, dated the 13th of *November* 1841, addressed to one *Thomas Starling*, containing the following passages; "You must

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be aware of the circumstances attending my visits to *Italy*, in the endeavour to recover from the heiress of the *Zeeubio* estate considerable advances I had, at her desire, made in liquidation of claims on my old friend the Count, who had left me his executor. I engaged *Charles Pearson* (meaning the plaintiff) as solicitor, a man whose total destitution of honourable principle we have found commensurate only with his consummate art, tact, and general ability. I thought him (meaning the plaintiff) honest, and believed his representations of having vastly more business than he had means to execute; and I was induced to make him several loans of some 50*l.* at a time, and seeing him, on one occasion, communicate information that threw his wife into great distress, I hastened home, and, unsolicited, inclosed him my cheque for 100*l.*, offering to double this sum, if he required so much to settle his difficulty. With these claims on his justice, if not his gratitude, he was profuse in protestations of attachment. * Having been arrested at the suit of a pretended claimant on the count's estate. I gave *Pearson* (meaning the plaintiff) a cheque for a sum between 500*l.* and 600*l.* to lodge with the secondary in lieu of bail. The chancellor, on the hearing, ordered the money to be immediately refunded; and I now saw the necessity for a journey to *Italy*. Despite of the order, under various pretences, *Pearson* (meaning the plaintiff), deferred obtaining the return of my deposit from day to day for three weeks; and, at the end of this time, gave me such assurances, I no longer doubted I should have it during the day, and therefore took places and prepared for my journey the next morning. To secure the money, I waited at his (meaning the plaintiff's) house much of the day, and until after midnight, when he appeared and said he had been again prevented seeing the secondary; but, if I would leave directions, the disposal

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of the money might be relied upon by ten the next morning. I had no choice, and wrote out instructions to pay 300*l.* to your father's care, and the balance, near 300*l.* more, to my bankers, to meet various cheques I had drawn; and I advised your father to take charge of this money, as we had agreed. Your father made repeated applications for this money without success; and at length, doubting *Pearson*'s (meaning the plaintiff's) veracity, called on the secondary to enquire why the deposit was not delivered up. The books were referred to; and your father is my witness that the scoundrel *Pearson* (meaning the plaintiff) had taken up the deposit two months before, and on the very day on which I had left *England!* Your father hastened to *Pearson* (meaning the plaintiff), who again protested however that he could not get the money out of the hands of the secondary. Indignant at his (meaning the plaintiff's) base treachery, your father said he had examined the books, and, on this denouement, *Pearson* (meaning the plaintiff) admitted the fraud, and confessed that he had applied the sum to his own uses, and had no present means of repayment.* On my return to *England*, and, after very much of vexatious difficulty and delays, I obtained from *P.* (meaning the plaintiff), not the return of the money of which I had been swindled, but a specious statement of pretended claims on property in the *West Indies*, &c. After much pressing him (meaning the plaintiff), finding I was obliged to revisit *Italy*, I obtained from him 100*l.* In *Italy* I took legal proceedings, and soon obtained from the countess a bond, to be accepted and guaranteed by her agents in *England*, for the full amount of my claim, reaching finally to upwards of 3000*l.* I forwarded the bond to *Pearson* (meaning the plaintiff), with instructions that he (meaning the plaintiff) should take all necessary steps to get this document ratified. Receiving no acknowledgment, I wrote again and again, but in vain.

At length I sent a statement of the particulars to my friend *Place*, who called on *P.* (meaning the plaintiff); and having obtained of him (meaning the plaintiff) the free avowal that I had been the greatest benefactor he (meaning the plaintiff) had ever known, put to him (meaning the plaintiff) the stringent query — how, then, could he (meaning the plaintiff) treat me so shamefully? He (meaning the plaintiff) at first denied the possibility that he (meaning the plaintiff) could ill-use me: but on *Place* handing him (meaning the plaintiff) my letter, he (meaning the plaintiff) lowered his face upon his hands, and affected to weep bitterly, conceding the truth of my statement, but utterly denying that he (meaning the plaintiff) had received any communication from me, although, after sending him the bond, I had written to him (meaning the plaintiff) five several letters. I was now obliged to obtain a duplicate copy of the bond. This I hastened to forward to *Place*, begging him to confide it into careful hands, upon which he could fully rely. Will it be believed! *Place*, in his progress to execute my desires, unhappily met *Pearson* (meaning the plaintiff) in the *Strand;* and such was the fascinating power of this wretch (meaning the plaintiff) that he (meaning the plaintiff) actually prevailed on *Place* to surrender to his (meaning the plaintiff) traitorous hands my second bond. *Pearson* (meaning the plaintiff) had promised me that, as I was forced to leave *England* on the second occasion with slender means, he (meaning the plaintiff) would supply the needful; but he (meaning the plaintiff) sent not one penny to my aid, and, with the wicked and cruel design of prolonging my absence, or perhaps bribed to commit the theft, he (meaning the plaintiff) daringly suppressed and denied that he (meaning the plaintiff) had received any communication, although his (meaning the plaintiff's) wife and her mother and brother well knew the fact, and have all

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three confessed to me the truth:" and in a certain oth part of the libel was the false &c. matter followin "From time to time I therefore renewed my applic tions; and, on my appointment to a foreign station, gave instructions to Mr. *Ashurst* to enforce the payme putting into his possession a correspondence wherein own (meaning the plaintiff's) confessions would h destroyed him (meaning the plaintiff.) With as m delay as he (meaning the plaintiff) could throw pleading all manner of objections, and offering bill one and two years for 150*l.*, which I rejected, (meaning the plaintiff) consented to my proposal arbitrate. I now had hope of a settlement; but neit threat nor entreaty could extort from him (mean the plaintiff) the name of his arbitrator; and length, within forty-eight hours of the appointm to embark, I was reduced to the mortifying ne sity of accepting his (meaning the plaintiff's) b resigning his (meaning the plaintiff's) letters, and ecuting the infamous release drawn up by his (m ing the plaintiff's) best wits, to bear testimony t solemn lie, that he (meaning the plaintiff) had settled demands. But it was, as my professional adviser s this or nothing; for I could not put to hazard an pointment of 800*l.* per annum, to stop and litigate claims; and my return to my country at any distant even was very unlikely: and this, *Pearson* (meaning plaintiff) knew full well. I embarked, and was sh wrecked. Soon after this event, finding that these l were considered worthless, I condescended to call ask my plunderer (meaning the plaintiff) to cash or both of them. He (meaning the plaintiff) had heartlessness to receive me rudely, and flatly refused request. Seeing him (meaning the plaintiff) afterwa rolling in his (meaning the plaintiff's) carriage, bou at the price of which he (meaning the plaintiff)

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defrauded me, I prevailed on my friend *Place* to endeavour to get him (meaning the plaintiff), even now, to renew the plan of arbitration of our differences. With great and persevering labour, Mr. *Place* at length extorted his (meaning the plaintiff's) assent, provided I would restore the bills. I consented to lodge them in our joint names. He (meaning the plaintiff) had concluded this was not in my power; and, so soon as he (meaning the plaintiff) found me willing, he withdrew his consent, and closed abruptly the negotiation: and every endeavour to re-open it has proved fruitless. This is *Charles Pearson*, (meaning the plaintiff) the man elevated by the noodled corporation of *London*, to a place of confidence and great trust, though his (meaning the plaintiff's) real character and deeds are known to many of them. But, as regards *my* unhappy connection with him (meaning the plaintiff) this is not the whole amount of injuries inflicted on me. When I learned from his own (meaning the plaintiff's) confession, that all hope of obtaining the second deed must be abandoned, I had no resource but to throw myself on the generosity of the agents of the countess. The monstrous hardship of my case was not to be denied: but for five or six years they put me at defiance, always challenging me to produce my bond. Worn out, however, by my continued applications, they made me the offer of 500*l.*, which, in my hopeless state, I was constrained to accept, and give my release for 3200*l.*, and interest. By this settlement I lost, besides my property, my peace of mind, my health; in some sort, suffering also in character, from the non-performance of duties and obligations I had been bereft of the means of fulfilling. To what extent *P.* (meaning the plaintiff) may have profited by my loss, I shall never ascertain. His (meaning the plaintiff's) scruples on this score may be easily conceived; and his (meaning the plaintiff's) gene-

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ral conduct too clearly elucidates his (meaning the plaintiff's) instincts. You have some time asked, my dear sir, why this lengthened episode? and, what has this to do with my father's affairs? I commenced it with the intention of shewing the original ground for my requiring the loan, and I have pursued it in order that those branches of your family who feel an interest in my circumstances may learn the amount of the moral persecution I have endured from the cold-blooded, unprincipled *Pearson* (meaning the plaintiff): By means of which" &c.

Pleas: first, not guilty; upon which issue was joined: second, a justification to so much of the libel set out in the declaration as is included between * *.

Replication, *de injuriâ.*

The cause was tried before *Coltman* J. at the *Middlesex* sittings, after *Hilary* term last. After proving the libel the plaintiff tendered in evidence two other letters from the defendant, the one bearing date the 27th of *May* 1842, and the other, the 25th of *February* 1843 (both written after the commencement of the present action), and addressed to the Lord Mayor for the time being. These letters were objected to on the part of the defendant; but they were received, on the ground that they would shew the *animus* of the defendant in writing the libel in question. The first letter contained a distinct charge that the plaintiff had received the sum of 500*l.* from the secondary, and had not paid it over; and the second reiterated, in substance, the charges contained in the letter to *Starling*. The defendant having failed to prove his plea of justification, a verdict was found for the plaintiff, damages 100*l.*

April 21. *Shee* Serjt., on a former day in this term, moved for a new trial, upon the ground that the letters in question had been improperly received. They were not neces-

sary to explain the alleged libel, or to shew the *animus* with which it was written, as that was sufficiently plain from the language of the libel itself. [*Cresswell* J. The argument then is, that the libel contained so much internal evidence of malice, that the plaintiff had no right to give any further evidence of malice.] It amounts perhaps to that. The letters put in were in themselves libellous, and separate actions might have been maintained upon each of them. He cited *Pearce* v. *Ornsby* (*a*), *Symmons* v. *Blake* (*b*), and *Stuart* v. *Lovell* (*c*). A rule nisi having been granted,

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Sir *T. Wilde* Serjt. (with whom were *Talfourd* Serjt. and *M. D. Hill*), on a subsequent day, shewed cause. The libel set out in the declaration contains several distinct charges against the plaintiff, a small part only of which is attempted to be justified. It was material to shew under what circumstances the libel was written, — to fix the real motive of the defendant — to prove that whilst he was putting forward one set of motives, he was actuated by others of a totally different character. Looking at the letter only, it might be supposed that the object of the writer was, to put forward some claim. Great allowances are made by courts of law in favour of parties who are betrayed into using harsh expressions in respect of matters in which they are personally interested; and the opinion of Lord *Ellenborough* was, that the convenience of mankind in conducting the ordinary affairs of life required very great latitude in cases of privileged communications. To repel any arguments of this description, if brought to bear upon the present case, it became desirable on the part of the plaintiff to anticipate such a line of de-

(*a*) 1 *Mood. & R.* 455.
(*b*) *Ibid.* 477.
(*c*) 2 *Stark. N. P. C.* 93.

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fence. The course resorted to by the plaintiff had the desired effect; and this rule was moved for, not on the ground of the libel being a privileged communication, but to raise the question, whether the defendant's letters to Sir *John Pirie* and to Mr. Alderman *Humphery*, when they respectively filled the office of Lord Mayor of *London*, were admissible in evidence. But for the production of those subsequent letters, the defendant would, no doubt, have contended that the letter declared upon had been written for the purpose of conveying information to *Starling*, without any intention of injuring the plaintiff. [*Shee* Serjt. It never was supposed that this was a case of privileged communication] The defendant was prevented from resorting to that species of defence by the course taken by the plaintiff in anticipation of such an attempt. The first libel purports to have been written to a person with whom the defendant appears to have had some pecuniary transactions; and if the two subsequent letters had not been produced and read, it is impossible to say that a jury might not have been persuaded by the defendant's counsel, to look upon the first letter as being in the nature of a privileged communication. [*Cresswell* J. Would it be any defence to *A. B.'s* action for a libel that the defendant had said to a third person "I want to borrow money of you, because *A. B.* decoyed me into a gambling-house, where I was robbed of all I had"?] The cases have gone very far. *Fairman* v. *Ives* (*a*); *M'Dougall* v. *Claridge* (*b*). It is not contended that the plaintiff may give evidence of having made another and distinct false charge against him the defendant, but the letters produced in this case contained merely a repetition of the former imputations. These letters were received for the purpose of establishing the malicious motive of the defendant, in

(*a*) 5 *B.* & *Ald.* 642. (*b*) 1 *Campb.* 267.

publishing the libel declared on. It was not an attempt to prove the existence of malice at one period by shewing that it existed at another. The malicious motive may be implied, and, on the other hand, such implication may be excluded by the occasion on which the defamatory expressions were used. [*Cresswell* J. In *M'Dougall* v. *Claridge* the defendant had an interest in the subject matter of the communication. In *Hearne* v. *Stowell* (*a*) the defamatory words declared on not having been spoken upon any justifiable occasion, the court of Queen's Bench refused to enter into a consideration of the motives by which the defendant was actuated. Where defamatory expressions are used the law in the first instance infers malice. If the occasion be such as rebuts the presumption of malice, the plaintiff is bound to show malice *in fact*. In considering the *occasion* of the communication, the court will not look at the *motives* of the speaker or writer.] The point is, however, sufficiently open to argument to justify a plaintiff in not relying upon the defendant's abstaining from such a course. The two letters were clearly admissible for the purpose of shewing the *animus* with which the defendant made the charge contained in the libel declared on. A wide door will be opened for defamation and libel, if every party is at liberty to mix up slander with any matter in which he may have an interest. In *Fairman* v. *Ives* the question left by *Abbott* C. J. to the jury was, whether the petition presented to Lord *Palmerston* contained only a fair and honest statement of the facts, according to the understanding of the party who presented it. In that case *Holroyd* J. said "So, in the case of a confidential communication made between friends, to prevent an injury, and not for the purpose of slandering, the occasion justifies the act."

(*a*) 12 *A.* & *E.* 719., 4 *P.* & *D.* 696.

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[*Cresswell* J. That must mean a communication to some friend upon some subject in which he is interested.] Mr. Justice *Holroyd* was very accurate as to the terms in which he expressed himself. [*Cresswell* J. The qualifying words may have been omitted in the report.] The same learned judge cites the case of *Cleaver* v. *Sarraude* (*a*) to the same effect. So, here, counsel might have applied the rule there laid down, to the present case, saying that the letter was sent solely for the purpose of inducing *Starling* to acquiesce in the writer's demand. *Best* J. concurs in the judgment, and says, "The letter complained of was addressed to the secretary at war, and was delivered to him, and to him only, with an intent to prevail on him to exert his authority to compel the plaintiff, an officer in the army, to pay to the defendant a debt." Here, if the plaintiff had omitted to prove that the defamatory matter had been shewn to other persons, the defendant would have relied upon the circumstance of the communication appearing to have been made to *Starling* only. There could be no better means of shewing that the act of the defendant did not come within the class of privileged communications, than by bringing before the jury the conduct of the defendant upon other occasions with reference to the same matter. Several cases which appear at first sight to militate against this view of the subject, are distinguishable from the present. In *Finnerty* v. *Tipper* (*b*) Sir *James Mansfield* C. J. refused to admit evidence of subsequent libels. But this was solely on the ground that the latter did not relate to the same subject matter; by which is meant, not the same *paper*, but the same *charge*. In the criminal courts it is the constant practice, upon the trial of an indictment for passing forged bank notes, to shew an uttering of such

(*a*) Cited in 1 *Campb.* 268. (*b*) 2 *Campb.* 72.

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notes upon another occasion. There is no substantial difference between saying "That which was written is true," and — repeating the libel verbatim, and adding the words "And all this is true." As was observed by Sir *James Mansfield* C. J. in that case, with reference to the case of *Tate* v. *Humphrey* (*a*) tried before Mr. Baron *Graham*. "Upon consideration I think the case before Mr. Baron *Graham* was rightly decided, inasmuch as the circumstance of preferring the indictment was there proved to shew the malice; and the indictment, in point of fact, *merely repeated the words for which the action was brought.*" So here, what is there but a repetition of the same libel, to the Lord Mayor of *London* for the time being? The letters were written in a deliberate manner, to persons whose bad opinion would be most prejudicial to the plaintiff. In *Finnerty* v. *Tipper* (*b*) the evidence rejected related to other publications. Here, the evidence given related to the same charge. It is totally unlike the case, — put by Sir *James Mansfield* C. J., — of proof of murder being offered upon the trial of an indictment for horse-stealing. *Symmons* v. *Blake* (*c*) and *Pearce* v. *Ornsby* (*d*) are said to be in point; but neither of those cases will, it is conceived, be found to apply. In *Mead* v. *Daubigny* (*e*), Lord *Kenyon* held, that in actions for defamation the plaintiff may give in evidence any words used by the defendant, with a view to shew the spirit with which the defendant was actuated. His lordship was however of opinion in that case, that he could not receive evidence of words actionable in themselves. But in the subsequent case of *Lee* v. *Huson* (*g*), that learned judge appears to have aban-

(*a*) 2 *Campb.* 73. n.
(*b*) *Ibid.* 72.
(*c*) 1 *Mood. & R.* 477.
(*d*) *Ibid.* 455.
(*e*) *Peake, N. P. C.* 125.
(*g*) *Ibid.* 166. It is said that, in *Scott* v. *Lord and Lady Oxford, Lawrence* J. permitted words not laid in the declaration, and which were actionable, to be given in evidence *in aggravation of damages*, ib. 126. n.

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doned the restriction which he had adopted in *Mead* v. *Daubigny*, as to receiving evidence of other words actionable in themselves. In *Charlter* v. *Barret* (*a*) the words complained of were spoken of the plaintiff as an attorney; and Lord *Kenyon* held that words spoken at different times might be given in evidence to shew the intention of the defendant. [*Cresswell* J. Were the words equivocal?] The words admitted in evidence were the same as those originally spoken. It might be convenient that the plaintiff should bring no other action for a repetition of the same words occurring before the trial of the first action. The distinction between giving evidence of other actionable words and of other words not actionable, is not founded on any principle. *Pearce* v. *Ornsby* was cited on moving for the rule, but in that case the rejection of the subsequent words proceeded upon a different ground. [*Cresswell* J. I think the evidence was offered with reference to the amount of damages.] It was. In *Symmons* v. *Blake* the subsequent words could have had no other effect than to inflame the damages, though they were tendered as proving that the plaintiff was the party meant in the conversation declared upon. *Patteson* J. there says, "I do not think the meaning of the words in this declaration can be mistaken. They are perfectly clear; and if other words of the same or similar import are given in evidence, the damages in this cause may be increased by those words, and yet this record be no evidence in a subsequent action which may be founded upon them. That is the mischief to be guarded against. I understand Lord *Abinger* recently acted on this principle. At *Exeter*, I admitted evidence of similar words spoken by the defendant on a previous occasion, and of an action having already been brought and damages recovered for those words, on the ground that the repetition of the slander

(*a*) *Peake, N. P. C.* 32.

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charged in the case shewed the malevolence of the party. In that case there was no ground for suggesting that the act was equivocal; the effect of the evidence tendered could therefore have been only to inflame the damages. In *Lee* v. *Huson* Lord *Kenyon* said that he "thought these letters (offered in evidence) by the plaintiff which also amounted to libels, might be received as evidence though they contained matter for another action"; and observed, "that in actions for words it was the practice to admit evidence of other words besides those charged in the declaration." The same principle was recognised by Sir *James Mansfield* C. J. in *Finnerty* v. *Tipper*. In *Macleod* v. *Wakley* (*a*) evidence was offered of another libel published after action brought. Lord *Tenterden* is reported to have said, "I am by no means satisfied that what is published at any time before the trial, may not be evidence to shew the motive of the party; however late any thing takes place, it may be evidence of a previous intention as to a previous fact." It is no legitimate argument against the admissibility of evidence, that it may possibly injure the defendant upon the trial of another action. That is not the proper test. The question to be decided is, whether the evidence is applicable to the then cause of action. If it is, the possibility of injury to the defendant is not to be regarded. (*b*) Upon an indictment for horse-stealing, where the circumstances under which the horse was taken rendered it doubtful whether a felony had been committed or not, any acts or declarations of the prisoner down to the time of trial would be receivable in evidence against him. It is no ground for excluding evidence of particular facts that the defendant has thereby rendered himself liable to other proceedings. In many cases in which I have been engaged the objection has been taken,

(*a*) 3 *Carr. & P.* 311.

(*b*) And see *Collett* v. *Lord Keith*, 4 *Esp. N. P. C.* 212.

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and it has uniformly failed. Here, the judge in summing up has endeavoured to guard the jury against the error of giving damages for matters not included in the action which they are trying. The possibility of the jury's being induced by the evidence to go wrong, would be an objection which might be taken in every case. In *Barwell* v. *Adkins* (*a*), which was an action for a libel in the *Northampton Herald*, the plaintiff was allowed to give evidence of a paragraph contained in a subsequent number of the newspaper, in which the charge was re-asserted, *for the purpose of shewing the defendant's intention.* In leaving the case to the jury, the judge told them to take both paragraphs with them, and to give such damages as they considered the plaintiff was entitled to *under the circumstances.* (*b*) This was held to be a proper direction, the court considering that the jury would understand the direction to import that they were to give damages only for the *first* paragraph, after ascertaining what the intention in publishing that paragraph was by looking at the second. (*c*) It would be a very great hardship upon plaintiffs if such a course were not allowed to be taken. If either party is to suffer, it ought not to be the plaintiff but the defendant, by whom the plaintiff has been slandered. If motives can be put forward on behalf of the defendant, the plaintiff surely has a right to meet and repel them.

Talfourd Serjt. on the same side. In a case which is not yet reported, *Maule* J. admitted evidence in mitigation of damages, after the cause of action in the special count had been proved. If evidence is receivable in miti-

(*a*) *Antè*, Vol. I. p. 807.

(*b*) The jury do not appear to have been cautioned against finding damages with reference to *all* the circumstances before them. Perhaps not many juries would be able, and fewer still would be inclined, to act upon any such caution, if given.

(*c*) *Vide post.* 720 (*a*).

gation of damages, it may be admitted in aggravation. In *Chubb* v. *Westley* (*a*) which was an action for a libel contained in a periodical work, articles which had appeared in subsequent numbers alluding to the action and defaming the plaintiff, were received in evidence for the purpose of shewing that the publications were part of a system, and not an accidental slip. Here, it was a question whether the communication was or was not intended to be confined to *Starling;* upon which point these letters would be most material. In support of this view of the case *Plunkett* v. *Cobbett* (*b*) is important. There, after proof of the publication by the defendant of a paper called *Cobbett's Weekly Register*, containing a libel on the plaintiff, *before* action brought, the witness was permitted to be asked, whether *after* action brought he had purchased another copy of the same paper at the defendant's office, for the purpose of shewing that the paper was circulated deliberately. [*Cresswell* J. Was that another copy of the same number? If not, it would be evidence to shew that there was a weekly publication of the *Register*, though the particular numbers so produced might not refer to the same subject.] Suppose the defendant had said whilst his trial was going on, "I wrote that for the purpose of injuring the plaintiff." [*Cresswell* J. The evidence cannot be shut out merely because it shews that which may be the subject of a future action. Libels published by the plaintiff against the defendant may be given in evidence in mitigation of damages. In *Fraser* v. *Berkeley* (*c*) a libel published by the plaintiff, was allowed to be given in evidence in mitigation of damages, in an action for a battery, although it might have been said that the libel

(*a*) 6 *Carr. & P.* 436.

(*b*) 5 *Esp. N. P. C.* 136., *S. C.* 2 *Selw. N. P.* 7th ed. 1048.

(*c*) 2 *Mood. & R.* 3., 7 *Carr. & P.* 621. And see *Tabart* v. *Tipper*, 1 *Campb.* 350.

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might become the subject of a cross-action.] Such action had in fact been brought against *Fraser*.

Shee Serjt., in support of the rule. Letters of the plaintiff were put in for the purpose of shewing the period at which the transaction alluded to in the defendant's letter to *Starling* took place, that the defendant was a creditor of the plaintiff, and that the defendant's circumstances were such that it would have been useless to sue him. It is said that the plaintiff put in the defendant's letters to Sir *John Pirie* and Alderman *Humphery*, for the purpose of anticipating a case of privileged communication, which, it is suggested, the defendant might probably have set up. The plaintiff had no right to anticipate the taking of such a course by the defendant. The defendant knew that there was nothing in the position of *Starling* which would have justified the making of a statement to him containing scandalous matter. The plaintiff was bound to know that the defendant had no right to treat this as a privileged communication; and he had no right to act upon the probability that it would be so treated. It was never contended that the publication proved in this case, was an *excusable* publication. It was simply said that the latter letters would never have been sent if the plaintiff had not thought proper to bring this case before a jury. It was not contended that this was the less a libel by reason of the relation in which the parties stood to one another. The letters to the Lord Mayors appear to come within the rule as to privileged communications. [*Wilde* Serjt. If so, that removes all objection to their admissibility in evidence. *Tindal* C. J. We do not think that you need labour that part of the case.] It seems to be admitted that *Finnerty* v. *Tipper* does not apply. The other cases which have been cited are more to the point. In *Symmons* v. *Blake* the additional

matter offered in evidence was contained in the same book. [*Cresswell* J. I cannot see why the reason would not apply to the admissibility of proof of words subsequently used, where the plaintiff is not precluded from suing in respect of such subsequent words, by reason of the statute of limitations having run.] It may be admitted that words spoken before the libel are not so strongly indicative of the intention of the party in publishing the libel as words spoken afterwards. All the cases are reconcilable with the opinion expressed by Lord *Ellenborough* in *Stuart* v. *Lovell.* (*a*) That was an action by the editor of the *Courier* newspaper against the editor of the *Statesman* newspaper for a libel in the latter paper. *Marryat* for the plaintiff tendered in evidence subsequent publications by the defendant in the *Statesman*, to shew *quo animo* the defendant published the articles declared on, urging that they would be admissible in the case of an indictment, and stated that the subsequent publications were not in themselves substantively actionable. His lordship said: "No doubt they would be admissible in the case of an indictment; and so they would here, to shew the intention of the party, if it were at all equivocal; but if they be not admitted for that purpose, they certainly are not admissible for the purpose of enhancing damage." In *Chubb* v. *Westley* (*b*) the evidence was admitted solely for the purpose of shewing *quo animo* the libel was published, and that the defendant considered it as applying to the plaintiff. By the term *quo animo*, must be understood the *sense* in which the words were used, and not, as contended on the other side, the *motive* of the defendant. This is shewn more clearly by *Hunt* v. *Elgar.* (*c*) There, the question was, whether an article inserted in a newspaper was a libel or not; which depended upon the effect to be given

(*a*) 2 *Stark. N. P. C.* 93.
(*b*) 6 *Carr. & P.* 436.
(*c*) 6 *Carr. & P.* 245.

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to the qualifying word "fudge," the introduction o which, it was contended, shewed that no discredit wa meant to be thrown on the plaintiff. In *Bond* v *Douglas* (*a*) the placards published by the defendar were received as evidence of the *animus*, that is, the in tention, of the party. So, in *Delegal* v. *Highley* (*b*), ev dence was given of the publication of the same libel another newspaper. [*Tindal* C. J. There the eviden was admitted for the purpose of shewing malice in fac Here, there is nothing equivocal. It is plain that was intended to impute to the plaintiff gross misconduc in his character as attorney. [*Tindal* C. J. The case one of considerable importance, and we will take time consider.]

Cur. adv. vu

TINDAL C. J. now delivered the judgment of t court.

This was an action for a libel, contained in a lett written by the defendant to one *Starling*, bearing da the 13th of *November* 1841. The plaintiff obtained verdict for 100*l*. A rule nisi for a new trial w granted, on the ground that the learned judge befo whom the cause was tried, had allowed the plaintiff give in evidence two letters, written by the defendar and bearing date the 27th of *May* 1842, and 25th *January* 1843, each addressed to the Lord Mayor f the time being, containing, in substance, a repetition the libellous matter for which the action was brough In answer to the rule it was contended, that the lette were admissible for the purpose of shewing the ex istence of actual malice in the mind of the writer the libel complained of, in order to repel by anticipatio any attempt by the defendant to establish that it was privileged communication. But we think that there wa no pretence for saying that the letter to Mr. *Starlin*

(*a*) 7 *Carr. & P.* 626. (*b*) 8 *Carr. & P.* 444.

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was a privileged communication, and that the other letters were not admissible for the purpose of answering by anticipation an untenable proposition.

But it was further contended that the subsequent letters, containing a repetition of the same defamatory matter, explained the *motives* by which the defendant was actuated in writing to Mr. *Starling*; and, that with a view to the damages to be recovered, the plaintiff was entitled to prove that the defendant was actuated by malice in fact. To this it was answered, that although subsequent publications, not in themselves actionable, might have been given in evidence for that purpose, yet these letters, containing matter for which other actions might be brought, were inadmissible, as there was nothing ambiguous in the language of the letter to *Starling* which they tended to explain: and two modern cases — *Pearce* v. *Ornsby* (*a*) and *Symmons* v. *Blake* (*b*) were cited, which, in one view of them, are authorities to that effect. On the other hand, Lord *Ellenborough*, in *Rustell* v. *Macquister* (*c*) altogether denied the soundness of the distinction, and there held that "you may give in evidence any words, as well as any act, of the defendant, to shew *quo animo* he spoke the words which are the subject of the action." And in other cases he appears to have admitted evidence to shew the motive and intention of a party publishing a libel; *Plunkett* v. *Cobbett*. (*d*) *Geare* v. *Britton* (*e*) is an authority to the like effect. On the same principle a defendant has been allowed to give evidence palliating, though not justifying, his act in publishing a libel, *ex. gr.* that he copied it from a newspaper; *Saunders* v. *Mills*. (*g*) And this appears to us to be the correct rule, viz. that either party may, with a view to the damages, give evi-

(*a*) 1 *Moo. & R.* 455.
(*b*) *Ibid.* 477.
(*c*) 1 *Campb.* 49.
(*d*) 5 *Esp. N. P. C.* 136.
(*e*) *Bull. Ni. Pr.* 7.
(*g*) 6 *Bingh.* 213., 3 *M. & P.* 520. So, from *Fox's Book of Martyrs*, *Cro. Jac.* 91.

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dence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but that, if the evidence given for that purpose, establishes another cause of action, the jury should be cautioned against giving any damages in respect of it. And, if such evidence is offered merely for the purpose of obtaining damages for such subsequent injury, it will be properly rejected. And perhaps the cases of *Pearce* v. *Ornsby* and *Symmons* v. *Blake* went no further than this. It may be difficult to reconcile all the nisi prius cases upon this subject; and the point does not appear to have been decided by any of the courts in *Westminster Hall.* (*a*) But, upon principle, we think that the *spirit and intention* of the party publishing a libel, are fit to be considered by a jury, in estimating the injury done to the plaintiff; and that evidence tending to prove it, cannot be excluded simply because it may disclose another and different cause of action.

Another argument against the admissibility of the letters tendered in evidence, was founded on the length of time that had elapsed between the date of the libel complained of, and the writing of those letters. But,—as it seems to us, — as they clearly relate to the same subject, the respective dates of the libel and of the letters may affect the value, but not the admissibility, of the evidence; and we think that, notwithstanding the two grounds of objection which have been taken, these letters were properly received.

The rule for a new trial must therefore be discharged.

Rule discharged.

(*a*) It has however been held in K. B., that in an *action* for a libel, *the tendency of the publication,* and not *the intention of the writer,* is the question to be submitted to the jury; *Haire* v. *Wilson,* 9 *B. & C.* 643., 4 *Mann. & Ryl.* 605. In *Fisher* v. *Clement,* 10 *B. & C.* 472., 5 *M. & R.* 730., the court recognised this distinction, even while supporting a contrary ruling of Lord *Tenterden,* on the ground that the jury must have understood the words "intention of the writer" to have been used in the sense of "tendency of the publication."

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April 23.

It is no objection to a motion for judgment as in case of a nonsuit, where a clear default has been committed, that a similar application was unsuccessfully made in the previous term, upon an affidavit which left it doubtful whether the application was not *then* made too soon.

GASELEE Serjt., on a former day in this term, obtained a rule nisi for judgment as in case of a nonsuit, the default alleged being in not proceeding to trial at the sittings after last term.

Dowling Serjt. shewed cause. Early in last *Hilary* term, the defendant obtained a similar rule to the present, which was discharged a few days afterwards, no default appearing in the affidavit. The motion was immediately renewed upon an amended affidavit; but that rule was also discharged, on the ground that the court will not permit a second application to be made in the same term upon what are substantially the same materials. (*a*) The present motion is likewise irregular, being founded on the same default. [*Cresswell* J. The affidavit on which the first application was founded, merely stated that issue was joined as of *Trinity* term last, without saying whether the cause was a town or a country cause, and consequently it disclosed no default; for the cause might be a country cause, in which case the plaintiff would not be guilty of a default, until two assizes had passed. That objection, however, is removed by lapse of time, as a second assize has passed; so that whether a town cause or country cause, a clear default has been committed.] A party cannot move twice upon the same state of facts; and, whatever the lapse of time, there has only been one default. [*Coltman* J. Since the last application, the plaintiff has been guilty of a default in not giving notice of trial for the sittings after term.]

(*a*) See *antè*, p. 268.

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The plaintiff had not time to give notice of trial, after the discharge of the second rule. [*Cresswell* J. Did that rule amount to a stay of proceedings?] Perhaps not. [*Cresswell* J. Then there was nothing to prevent him from giving notice of trial.] Although not absolutely prevented, it is submitted that he was not *bound* to proceed while the last application remained undecided.

Gaselee, in support of the rule, contended that there was a clear default to which no answer had been given.

TINDAL C. J. The objection taken upon the original application was far from being a gracious one. The plaintiff must give a peremptory undertaking.

Rule accordingly.

April 27.

BURGESS *v.* LANGLEY.

The court refused to grant a rule nisi for a new trial, upon an affidavit stating that one of the jury declared in open court in the presence and hearing of the others that the verdict had been decided by lot.

DEBT, to recover 47*l.* 16*s.* 3*d.* the price of a phaeton sold and delivered by the plaintiff to the defendant. Plea: *nunquam indebitatus.*

At the trial before *Tindal* C. J. at the sittings at *Guildhall* after last *Hilary* term, the only question between the parties was, whether the carriage had been sold for ready money or upon an unexpired credit of twelve months; and on this point there was contradictory evidence. It appeared that the sale took place in *August* 1842, and that the action was commenced immediately afterwards.

The jury having returned a verdict for the defendant,

Shee Serjt. on a former day in this term moved for a new trial, alleging misconduct on the part of the jury.

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The motion was supported by an affidavit of the plaintiff's attorney, who deposed that the case having been summed up to the jury, they retired to consider of their verdict; that the Lord Chief Justice left the court, it having been arranged that the verdict should be received by the officer; that the jury were absent for nearly an hour, and, on their return into court, being asked by the officer whether they had agreed on a verdict, the foreman replied in the affirmative, and said they found for the defendant, but that they recommended that each party should pay his own costs; that the officer thereupon informed the jury that such recommendation could not form part of their verdict (*a*), but that the verdict must be entered generally for the defendant; that immediately on the delivery of the verdict, an officer of the court paid to the jury the accustomed fees; that just as the payment of such fees was concluding, and before the jury had retired from the court, one of them, in the presence and hearing of *the several members of the jury*

(*a*) Where the verdict is for the *defendant*, the jury has no jurisdiction with respect to costs, the 23 *Hen.* 8. *c.* 15. giving the defendant, when he succeeds by nonsuit or verdict, "judgment to recover his costs against the plaintiff, to be assessed and taxed at the discretion of the *court*." But where the *plaintiff* obtains a verdict, his costs are assessed by the jury, and the court only gives costs *de incremento*. This appears to be not an immaterial distinction, as it was said by *Richardson* C. J. of C. P. in *M.* 5., *Car.* I. to be the resolution of all the justices in K. B. and C. P. that in an action upon the case for slander, though the *court* are bound by the 21 *Jac.* 1. c. 16., and cannot increase the costs when the damages are under 40*s.*, yet the *jury* are not bound by that statute, and therefore they may give 10*l.* costs where they give 10*d.* damages.; 1 *Salk.* 207. This resolution seems, however, to turn upon the particular words of the sixth section of the 21 *Jac.* 1. *c.* 16., "shall have and recover only so much costs as the damages so given or assessed amount unto, *without further increase of the same*." The 21 *Jac.* 1. *c.* 16. *s.* 6., though not among the statutes and enactments expressly repealed by the 3 & 4 *Vict. c.* 24., appears to be inconsistent with the provisions of the latter statute.

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remaining in court, openly and publicly announced,—remarking on the verdict what had just been recorded,—that they the said jury never should have agreed as to a verdict in the said cause, but that they were equally divided, being six for the plaintiff and six for the defendant, and that none of the jury would give way, but that they had agreed to put their names into a hat, and resolved that the names should be drawn by the foreman, and the first name drawn, whether for plaintiff or defendant, should go on the opposite side to that for which he was for finding a verdict, and that thereupon the jury should give their verdict in court for the party who had, by such means, the majority of jurors, and should recommend that each party should pay his own costs of the action; and the said juror declared that accordingly such plan was adopted, and that the name first drawn was that of a juror who was in favour of the plaintiff, and whose voice was thereupon reckoned, according to the said arrangement, for the defendant; and thereupon the said jury had returned into court and given their verdict as before mentioned; that the declaration or statement so made by the said juryman was made in court immediately after the giving of the said verdict, and in the presence of *the others* of the said jury in this cause then being present in court and hearing the same, and that such declaration or statement was not disavowed, nor denied, nor contradicted by any one of the jury, but that, on the contrary, one of the jury who was at that moment appealed to by the member of the jury, who made the above statement as to the mode in which the verdict had been obtained, as to whether the juror appealed to had not been for the plaintiff before the said drawing of the said names of the jury, the juror so appealed to replied—no, that he was for the defendant, and that the juror so appealing to him had had to come on the defendant's side; that the deponent verily believed that the verdict, so given for the defendant, was obtained by the means of

drawing a lot for the same as aforesaid; and that the statement of the said juryman as to the drawing as aforesaid was made in the presence and hearing of the officer of the court.

The learned serjeant contended that the affidavit disclosed sufficient grounds for setting aside the verdict. [*Cresswell* J. Had the statement made in the affidavit come from the officer who had charge of the jury, we might have attended to it; but it has long been decided, that the affidavit of a juryman as to the mode in which the jury arrived at their verdict, cannot be received. If that be so, how can we act on a mere statement made by a juryman, and coming through the attorney of the losing party? *Erskine* J. In *Straker* v. *Graham* (*a*) the court of Exchequer rejected an affidavit made by the plaintiff's attorney, who deposed that one of the jury had told him that they had decided their verdict by tossing up.] This case is distinguishable; for here the statement was made in open court before the rest of the jury. [*Erskine* J. Not of all; for some, if not the greater part, appear to have gone away. (*b*)] Taken in conjunction with the recommendation as to costs, it is submitted that the verdict is so unsatisfactory as to call for a new trial.

TINDAL C. J. On general principles such an affidavit as the present is clearly inadmissible. We will, however, inquire of the associate whether any thing occurred in his presence at the time that the verdict was delivered, so as to take the case out of the general rule.

Cur. adv. vult.

TINDAL C. J., on a subsequent day, said: — We have made inquiry of the associate as to what took place in

(*a*) 4 *M. & W.* 721.

(*b*) But the affidavit speaks, not of "several," but of "*the* several" members of the jury, and afterwards, not of "others," but of "*the* others," *suprà*, 723, 724.

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his presence at the time of giving the verdict, and from his statement it appears that, in answer to the usual question put by him when they came into court, the jury said they found for the defendant, but recommended that each party should pay his own costs; that the associate told him that they had nothing to do with the costs, and asked them if they were agreed in their verdict for the defendant, when he received an answer in the affirmative, whereupon he recorded the verdict. Under these circumstances, we think that the case falls within the principle acted upon in *Straker* v. *Graham* and in other decisions, and that the rule must be refused.

Rule refused.

April 26.

KAVANAGH *v.* GUDGE and Others.

A rejoinder in trespass *quare domum fregit*, setting out a proviso for re-entry, in case the rent, which was reserved half-quarterly, should be unpaid on any day on which the same should become due, or within ten days afterwards, and averring that, the rent for *one year* being due and unpaid, they, as servants of the landlord, entered, &c. (without alleging that the entry was made after the expiration of ten days from the time that any half quarter became due), is bad for duplicity, as setting up either seven or eight half-quarterly periods at which rights of entry accrued.

The right of re-entry being considered by the court to be in the nature of a right of re-entry for a *forfeiture*, leave to amend was refused. (*a*)

TRESPASS. The declaration stated that the defendants, on the 27th of *March* 1841, and on other days between &c., with force and arms, broke and entered a dwelling-house of the plaintiff, situate &c., and made a great noise and disturbance therein for a long time, to wit &c., and forced and broke open, &c., divers, to wit, five doors of and belonging to the said dwelling-house, &c. &c., and on the day and year first aforesaid, with force and arms, ejected, &c., the plaintiff

(*a*) *Vide post*, 734. (*b*).

and her family from the possession and enjoyment of the said dwelling-house, and kept them so ejected, &c., for a long time, to wit, thence until the commencement of this suit, and also during the time aforesaid, to wit, on the 12th of *May* in the year aforesaid, with force and arms, seized and took divers goods and chattels, to wit, &c., of the plaintiff, of great value, to wit, 50*l.*; and also during the time aforesaid, to wit, on the day and year last aforesaid, with force and arms, assaulted the plaintiff, and beat and bruised and ill-treated the plaintiff, and seized and laid hold of her, and with great force and violence pushed, pulled, and dragged her about, and forcibly forced her to go from and out of the said dwelling-house into the public streets there: by means of which premises the plaintiff, during all the time aforesaid, lost and was deprived of the use and benefit of her said dwelling-house, and was put to great inconvenience and much expense, to wit, 20*l.*, in procuring and removing to another residence for herself and family; and other wrongs, &c.

Plea—as to so much of the declaration as relates to the breaking and entering the said dwelling-house and to the making a little noise and disturbance therein, and continuing therein making such noise and disturbance for the said space of time in the declaration mentioned, and as to the forcing and breaking open the said doors, &c., and as to the ejecting, &c., the plaintiff, from the possession and enjoyment of the said dwelling-house and keeping her so ejected, &c., for the said space of time in the declaration also mentioned, and as to the seizing and taking the said goods and chattels, and as to the assaulting the plaintiff and seizing and laying hold of her and gently forcing her from the said dwelling-house into the public streets in the declaration also mentioned—that one *Evans*, before any of the said times when,

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&c., to wit, on the 3d of *October* 1823, was seised, in his demesne as of fee, of and in the said dwelling-house, and being so thereof seised, afterwards and before any of the said times when, &c., in the declaration mentioned, to wit, on the day and year last aforesaid, by a certain indenture then made by and between *Evans* of the one part and *Temperance Arden* of the other part [excuse of profert], *Evans* did demise, lease, and to farm let, unto *Arden* the said dwelling-house; habendum, unto *Arden*, her executors, &c., from the 29th of *September* then last past to the full end and term of fifty-four years thence next ensuing; and that such indenture is still in force and effect; that *Arden* being so thereof possessed, the plaintiff claiming title to the said dwelling-house, under colour of a certain charter of demise, pretended to be thereof made to her by *Evans*, for the term of her natural life, before the making of the said demise by *Evans* to *Arden* as aforesaid, — whereas nothing of or in the said dwelling-house, or any part thereof, ever passed by virtue of that charter, — afterwards and before any of the said times when, &c., and during the continuance of the said term so demised to *Arden* as aforesaid, to wit, on the first day in the declaration mentioned, entered into and upon the said dwelling-house, and was thereof possessed, whereupon the said defendants, as the servants of *Arden*, and by her command, at the several times when, &c., in the declaration mentioned, broke and entered into and upon the said dwelling-house, and made a little noise and disturbance therein, and stayed and continued therein making such noise and disturbance for the space of time in the declaration mentioned, and then forced and broke open the said doors, &c.; and because the said goods and chattels in the declaration mentioned, before the said several times when, &c., and had been wrongfully and injuriously put and placed,

and were at those times remaining and being, in and upon the said dwelling-house and encumbering the same, they, the defendants, as the servants of *Arden*, in that behalf, and by such command as aforesaid, gently removed the same from and out of the said dwelling-house to a small and convenient distance, and there left the same for the use of the plaintiff; and thereupon the plaintiff, just before and at the several times when, &c., being unlawfully in the said dwelling-house, endeavoured to prevent the defendants from obeying such command as aforesaid, and stayed and continued in the said dwelling-house, making a great noise and disturbance without the leave or licence and against the will of *Arden* and of the defendants; and thereupon the defendants, as the servants of *Arden*, and by her command, then requested the plaintiff to go and depart from and out of the said dwelling-house, which she then wholly refused to do; whereupon the defendants, as the servants and by the command of *Arden*, in order to obtain possession of the said dwelling-house, gently laid their hands upon the plaintiff in order to remove, and did then remove, the plaintiff from and out of the said dwelling-house, as they lawfully might for the cause aforesaid, &c., which are the same, &c. Verification.

Replication — that after making the said indenture of demise, and whilst *Arden* was possessed of the said dwelling-house for the term thereby granted and before any of the said times when, &c., to wit, on the 25th of *December* 1834, the said *Arden* demised the said dwelling-house in the said declaration mentioned, and in which, &c., to the plaintiff and *W. H. Goddard* as tenants from year to year, by virtue of which said demise the plaintiff and the said *Goddard* afterwards, and before any of the said times when, &c., entered into the said dwelling-house in the said declaration mentioned, and in which,

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&c., with the appurtenances, and became and were possessed thereof from thence until the defendants afterwards, to wit, at the seveal times when, &c., of their own wrong, broke and entered into the said dwelling-house in the said declaration mentioned, and in which, &c., and committed the said several trespasses in the introductory part of the plea mentioned, *modo et formâ*. — Verification.

Rejoinder — that the demise in the replication mentioned was a certain demise by *Arden* to the plaintiff and *Goddard* on the said 18th of *December* 1834, by a certain agreement in writing, made and entered into by and between *Arden* of the one part and the plaintiff and *Goddard* jointly and severally of the other part, whereby *Arden* agreed to let, and the plaintiff and *Goddard* jointly and severally agreed to take of *Arden*, from the 25th of *December* then instant, as yearly tenants, subject to six months' legal notice to be given by either party to the other, a house and premises, with the use of fixtures and other things as scheduled at the back thereof, and appurtenances situate, &c., at the clear yearly rent of 30*l*., payable *half-quarterly*; and the plaintiff and *Goddard* jointly and severally agreed to pay the rent in manner aforesaid, and also to pay all land-tax, sewer-rates, &c.; and in default thereof, and without first requiring the payment by the plaintiff and *Goddard*, *Arden* might, and she was thereby authorised to, pay the same or any part thereof, and, without any demand whatsoever, recover the amount so paid by distress upon the said premises as in case of distress for rent in arrear, or by any other legal proceedings whatsoever, with the expenses thereof respectively: and the plaintiff and *Goddard* also agreed to keep the whole of the house and premises in good repair, &c.; and *Goddard* did thereby further agree that if the said rent or any part thereof should be unpaid on any

day on which the same should become due, *or within ten days afterwards*, or if the plaintiff and *Goddard* should not at all times observe and keep the several conditions and agreements therein-before mentioned, or quit and deliver up possession of the house and premises according to the notice therein-before mentioned, then, and in either of such cases, and without any demand whatsoever, it should be lawful for the said *Arden* and her agents immediately to enter upon and take possession of the house and premises, and the plaintiff and *Goddard*, and all persons claiming under them for ever to expel and remove therefrom without any legal process whatsoever, and as effectually as any sheriff might do in case the said *Arden* had obtained judgment in ejectment for the recovery of possession thereof, and as if a writ of *habere facias possessionem* or other process had issued on such judgment, directed to such sheriff in due form of law; and in case of such entry, and of any action being brought or other proceedings taken for the same by any persons whom soever, the defendants might plead leave and licence of the plaintiff; and *Goddard*, their executors or administrators, or any persons claiming any interest or possession from or under them to *Arden*, her executors and administrators, and all persons acting therein, by their or any of their order for the entry or trespasses or other matters to be complained of in such action or other proceedings. By virtue of which agreement the plaintiff afterwards and before the commencement of this suit, to wit, on the said 25th of *December* 1834, entered into and upon the said premises, being the said dwelling-house in the declaration and in the said replication to the said last plea mentioned, and became and was possessed thereof for the said term so thereof granted as aforesaid. Averment: that afterwards and after the making of the said agreement, and before the

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commencement of this suit, and during the continuance of the said term, and whilst the plaintiff was so in the possession of the demised premises as aforesaid, under and by virtue of the said demise, to wit, on the 25th of *March* 1844, a large sum of money, to wit, 30*l.* of the rent aforesaid for one year of the said term, ending on the day and year last aforesaid, and then last elapsed, became and was due and payable from the plaintiff to *Arden* under and by virtue of the agreement, and was then demanded by *Arden* of the plaintiff and *Goddard*, and was at the several times when, &c., in the declaration mentioned, and still is, in arrear and unpaid; wherefore the defendants, as the agents of *Arden*, and by her command, on the said first day when, &c., in the declaration mentioned, and whilst the said plaintiff was so in the possession of the said demised premises as aforesaid, and during the said term, did, in pursuance of the power contained in the said agreement, enter into and upon the said dwelling-house, for the purpose, and with the intent, of taking possession of the same, as authorised by the said agreement; and thereupon the defendants then requested the plaintiff to go and depart from and out of the said dwelling-house, which the plaintiff then wholly refused to do; whereupon the defendants, as such agents, and by such command as aforesaid, at the time first above mentioned, gently laid their hands upon the plaintiff in order to remove, and then did remove, the plaintiff from and out of the said dwelling-house, and because the said goods and chattels in the declaration mentioned, before and at the several times, when, &c., were wrongfully in and upon the said dwelling-house, encumbering the same, and doing damage there, they, the defendants, at the said time when, &c., seized and took the said goods and chattels in the said dwelling-house, there so encumbering the same as aforesaid, and re-

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moved and carried away the same to a small and inconvenient distance, to wit, in the parish aforesaid, and there left the same for the use of the plaintiff, doing no unnecessary damage on the occasion aforesaid, as they lawfully might for the cause aforesaid, &c.

Special demurrer to this rejoinder, assigning for cause, amongst others, that the particular forfeiture on which the defendants relied was not stated in the rejoinder in this, to wit, it appeared that the rent was payable half-quarterly; and it was alleged that a year's rent became due on the 25th of *March* 1841, which included *eight half-quarterly payments and eight causes of forfeiture*; and it did not appear on which of those forfeitures the defendants relied as putting an end to the said term and justifying the trespasses in the declaration complained of, and in this respect the said rejoinder was double and multifarious and no single surrejoinder could be pleaded hereto. Joinder in demurrer.

Bompas Serjt. in support of the demurrer. The rejoinder is clearly bad; for the defendants had no right to enter until ten days after the rent was due; and it contains no averment, as it ought to have done, that the rent had been due for that period. All that is alleged is that one yearly rent was due. It will perhaps be argued, as the rent was to be paid half-quarterly, that it is necessarily to be inferred that more than ten days had elapsed after default in payment of the first half-quarter's rent; but if that be so, then the rejoinder is bad for duplicity, for the same inference will arise with respect to every half-quarter, except perhaps the last; and the plaintiff cannot tell for which default the defendants claim to exercise the right of re-entry.

Channell Serjt. contrà. It is submitted that the proviso set out in the rejoinder gives two rights of re-entry,—the one if the rent be not paid on the day when it

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becomes due, and the other if it be not paid within ten days afterwards; *Doe dem. Rudd* v. *Golding.*(*a*) The literal construction of the words is, to confer two rights of entry; and we have availed ourselves of one of them. If it should be thought that the words "or within ten days afterwards" are inconsistent with the right to re-enter on the day the rent falls due, they may be rejected, and the proviso read as giving the right to re-enter for a default upon the day; which will make the rejoinder good. Supposing, on the other hand, the proper construction of the proviso to be that it gives only one right of entry if the rent be not paid within ten days after it falls due, then it as clearly appears that more than ten days had elapsed since a default had been made; as a year's rent is averred to be due. [*Tindal* C. J. That gives rise to the objection as to duplicity.] That might be so if this is to be considered as a condition; but in *Doe dem. Davis* v. *Elsam* (*b*), it was held by Lord *Tenterden* that provisoes for re-entry in a lease are to be construed like other contracts, and not with the strictness of *conditions* at common law. [*Coltman* J. This is not so much a question as to the construction of the proviso, as it is to the proper mode of pleading it.] The contract substantially contained in the

(*a*) 6 *J. B. Moore*, 231.

(*b*) *M. & M.* 189. In that case Lord *Tenterden* says, "I do not think provisions of this sort are to be construed with the strictness of conditions at common law. These are matters of *contract* between the parties, and should, in my opinion, be construed as other contracts. The parties agree to a tenancy on certain terms; and there is no hardship in binding them to those terms. In my view of cases of this sort, the provisoes ought to be construed according to fair and obvious construction, without favour to either side." This was said by Lord *Tenterden* upon the trial of an ejectment brought to enforce the forfeiture, and would be still more applicable to a defence in an action of trespass brought against the landlord for acting upon the terms of his contract.

However no laxity of construction would have enabled the court to treat *seven* matters, (the *eighth* period of re-entry not being shewn to have arrived,) each giving a right of entry, as constituting one defence.

proviso is, that if any rent be overdue, the lessor shall have a right to re-enter. [*Cresswell* J. On the nonpayment of which half-quarter do you rely?] The defendants are not bound to say: they allege that a *year*'s rent (*a*) is due. [*Cresswell* J. Then when did it become due? You are driven to sever the year, and if so, for which of the eight portions do you claim, and why one more than another? *Erskine* J. How could the plaintiff reply a waiver of the forfeiture as to any particular half-quarter (*b*)?]

TINDAL C. J. This is a point of pleading. It is impossible to read the agreement without seeing that the landlord has no right to re-enter until after the expiration of ten days from the time that some half-quarter's rent falls due; and the question is, how does it appear on the record that any part of this rent was due and unpaid for ten days. If the defendants say that the rejoinder, by alleging that a year's rent is due, necessarily shews that the first half-quarter is so overdue, the plaintiff may reply—that is equally the case with the last half-quarter but one. The defendant has no right, in order to support his rejoinder, to select any half-quarter that he pleases. (*c*) It seems to me that, at any rate, the rejoinder is bad for duplicity.

Channell Serjt. asked leave to amend, which was refused by the court, as it would be in favour of a forfeiture (*d*), and there was a plea of leave and licence on the record.

Judgment for the plaintiff. (*e*)

(*a*) But not that *ten* days elapsed, after that rent became due, and before the entry.

(*b*) *Quære*, whether the recognition of a tenancy after the *seventh* right of re-entry had accrued, would not have been a waiver of preceding rights.

(*c*) *Quære*, whether a defendant would not be allowed to *plead* each separately, under the statute of *Anne*.

(*d*) *Vide suprà*, 734. (*b*).

(*e*) See a further report of his case, *post*, Vol. VI.

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By indenture between *A.* of the first, *B.* of the second, and *C.*, *D.*, *E.* and *F.* of the third part, *A.* covenanted with *C.*, *D.*, *E.* and *F.* to do certain repairs to the parish church of *Z.*; and in consideration of covenants on *A.*'s part, *C.*, *D.*, *E.* and *F.* "churchwardens, and overseers of the poor of the parish of, *Z.*, for themselves and for their successors, churchwardens, and overseers of the said parish, and their assigns, did thereby covenant with *A.*, his executors and administrators, that they, the said churchwardens and overseers of the poor, their successors or assigns, should and would well and truly pay, or cause to be paid, unto *A.*" the sum specified, by certain instalments. After this covenant the deed proceeded as follows: "Provided always that nothing in these presents contained, shall extend, or be deemed, adjudged, construed, or taken to extend, to any *personal* covenant of, or obligation upon, the said several persons parties thereto, of the third part, or in anywise *personally* affect them, any or either of them, their, or any or either of their executors, administrators, goods, effects, or estates in their private capacity, but shall be, and is intended to be, binding and obligatory upon churchwardens and overseers of the poor of the parish of, &c., and their successors for the time being, as such churchwardens and overseers of the poor, but not further or otherwise."

Held, that the covenant of *C.*, *D.*, *E.* and *F.* was a *personal* covenant, and that the proviso, being repugnant thereto, was void.

COVENANT. The declaration stated that on the 11th of *May* 1841, by a certain indenture then made between the plaintiff, of the first part, *Charles Bleadon* and *Charles Furnivall*, of the second part, and the defendants, of the third part (which indenture being in the possession of the defendants, the plaintiff could not shew the same to the court &c.), the plaintiff covenanted, contracted, and agreed with the defendants, and their successors and assigns, churchwardens and overseers of the poor, for the time being, of the parish of *St. Botolph without Aldgate*, in the city of *London* and county of *Middlesex*, that the plaintiff, his executors, or administrators should, for the consideration thereinafter mentioned, within the space or time of five calendar months from the day of the date of the said indenture, do, perform and execute, or cause and procure to be done, performed and executed, in, and to, the said parish church of *St. Botolph without Aldgate*

aforesaid, all the works and repairs mentioned or referred to in the specification thereinafter contained, and according to such specification and the drawings thereinafter also contained, and finish and complete the whole of such works and repairs, within the time aforesaid, in a good, proper, workmanlike and substantial manner, under the direction, and to the satisfaction, of Messrs. *W.* & *B.* surveyors and architects, or other the surveyors or surveyor, architects or architect, for the time being, of the said churchwardens and overseers, their successors or assigns, fit for use and divine service to be performed therein, &c. &c., and that, in consideration of the covenants and agreements therein contained on the part of the plaintiff, they the said several persons parties thereto of the third part, churchwardens and overseers of the poor of the parish of *St. Botolph* aforesaid, *for themselves and for their successors, churchwardens and overseers of the said parish*, and their assigns, did thereby covenant and promise with and to the plaintiff, his executors and administrators, that they *the said churchwardens and overseers of the poor, their successors or assigns*, should well and truly pay, or cause to be paid, unto the plaintiff, his executors or administrators, the sum of 1169*l.*, or such other increased or diminished sum as the said surveyors and architects, surveyor or architect, for the time being, as aforesaid, should, under the powers aforesaid, certify between the said several parties, to be the proper sum to be paid for the works and repairs, by the instalments at the several times and in manner thereinafter mentioned; that is to say, one-third of the amount thereof within two months from the commencement of the works on the third part thereof from the time of the completion of the said several works, and the remaining one-third thereof, at the expiration of one calendar month from the time

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of such completion of the said works and repairs; as by the said indenture, reference being thereunto had would appear. Averment: that, after making the indenture, to wit, on &c., the plaintiff did, performed, and executed, in and to the said parish church, all the works and repairs mentioned and referred to in the said specification, according to such specification and the said drawings, and finished and completed the whole of the said works and repairs in a good, proper, workmanlike manner, under the direction, and to the satisfaction, of the said Messrs. *Wyatt* and *Brandon*, fit for use and divine service to be performed therein, &c. &c. Breach: that, although the defendants had paid to the plaintiff two of the said instalments of the said sum of 1169*l.*, and although the period of one calendar month from the time of the completion of the said works and repairs had elapsed before the commencement of this suit, and although *W.* and *B.*, by the procurement of the defendants, had refused and neglected to ascertain and affix the measure and value of the increased and additional works and repairs, or to certify the proper sum to be paid to the plaintiff for such increased and additional works and repairs, although a reasonable time in that behalf had elapsed before the commencement of this suit, and although they were, after such additional work and repairs were completed, to wit, on &c., requested by the plaintiff so to do; yet the defendants did not nor would pay to the plaintiff the said remaining one-third part of the sum of 1169*l.*, amounting to 389*l.* 13*s.* 4*d.*, and the said amount of the measure and value of the said increased and additional works and repairs, or any part thereof, and the same still remained wholly due and unpaid to the plaintiff, &c.

The defendants confessing that the said indenture at

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the time of the plaintiff so declaring was, and still is, in their possession, so that the plaintiff could not, nor can, produce the same to the court here as in the declaration alleged, craved oyer thereof. The plea then set out the indenture, which bore date the 11th of *May* 1841, and was made between *James Furnivall* (the plaintiff) of the first, *Charles Bleadon* and *Charles Furnivall* of the second, part, and *Robert Coombes*, *Edward Jones*, *Charles R. Coltman*, and *Isaac Simmonds*, churchwardens of the said parish of *St. Botolph* without *Aldgate*, in the city of *London*, and county of *Middlesex* aforesaid, and *William Pattinson*, *Robert Clarter*, *Samuel Hawkins Jutsum*, *John Neal*, *John Anthwaite*, and *Stephen Boxall* overseers of the poor of the said parish of the third part. The deed, after various covenants entered into by the plaintiff, which were described as being entered into with the said several persons parties thereto of the third part, and their successors and assigns, churchwardens and overseers of the poor for the time being of the parish of *St. Botolph* without *Aldgate*, contained the following on the part of the defendants: and, in consideration of the covenants and agreements herein contained on the part of the said *J. Furnivall*, they the said several persons parties thereto of the third part, churchwardens and overseers of the poor of the parish of *St. Botolph* for themselves, and for their successors, churchwardens and overseers of the said parish, and their assigns, do hereby covenant and promise with and to the said *J. Furnivall*, his executors and administrators, that they the said churchwardens and overseers of the poor, their successors or assigns, shall well and truly pay, or cause to be paid, unto the said *J. Furnivall*, his executors or administrators, the sum of 1169*l.*, or such other increased or diminished sum as the said surveyors and architects, surveyor or architect for the time being as aforesaid, shall, under the powers aforesaid, certify between the

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said several parties to be of the proper sum to be paid for the works and repairs by the instalments at the several times and in manner thereinafter mentioned, that is to say, one third of the amount thereof within two months, from the commencement of the works, one other third part thereof at the time of the completion of the said several works, and the remaining one third part at the expiration of one calendar month, from the time of such completion of the said works and repairs: provided always, that nothing in these presents contained shall extend to, or be deemed, adjudged, construed, or taken to extend to, any personal covenant, of or obligation upon the said several persons parties hereto of the third part, or in anywise personally affect them, any or either of them, their or any or either of their executors, administrators, goods, effects, or estates in their present capacity; but shall be, and is intended to be, binding and obligatory upon churchwardens and overseers of the poor of the said parish of *St. Botolph*, and their successors for the time being as such churchwardens and overseers of the poor, but not further or otherwise, &c. &c. The plea then proceeded to state that before the said sums in the declaration alleged to have become due and payable to the plaintiff, or any or either of them, or any part thereof became due, and before the commencement of this suit, to wit on the 29th of *March* 1842, the defendants ceased being churchwardens and overseers of the poor of the said parish of *St. Botolph*, and they were not at any time since, or at the commencement of this suit, such churchwardens and overseers. Verification.

The second plea — as to the cause of action in the declaration mentioned, in respect of the defendants not paying to the plaintiff the said remaining one third part of the said sum of 1169*l.*, amounting to 389*l.* 13*s.* 4*d.*, — stated that the plaintiff did not within the space or time of

five calendar months, from the day of the date of the said indenture, do, perform or execute, or cause or procure to be done, performed or executed, in and to the said parish church, all the works and repairs so covenanted and agreed by him to be done, performed, and executed as in the declaration alleged; concluding to the country.

Replication to the plea of the defendants by them first above pleaded, so far as the same related to the defendants, *J. Simmonds* and *S. Boxall* — that the defendant *J. Simmonds* continually, from the time of making the said indenture until and at the several times when the several sums of money in the declaration mentioned became due and payable, and from thence until and at the commencement of this suit, was and still is churchwarden of the said parish, and the defendant, *S. Boxall*, continually, from the time of making the said indenture until and at the several times when the several sums of money became due and payable to the plaintiff, and from thence until and at the commencement of this suit, was and still is overseer of the poor of the said parish; *without this*, that the defendants, *J. Simmonds* and *S. Boxall*, or either of them, ceased being churchwarden or overseer of the poor of the said parish in manner and form as in the said first plea alleged; concluding to the country.

Demurrer to the same plea, so far as it related to the other defendants, shewing, for causes of demurrer, that the same plea did not avoid the declaration, and the other defendants, by ceasing to be churchwardens and overseers, were not excused or discharged from the performance of the covenant upon which the plaintiff had declared; and the said indenture did not provide that the defendants should cease to be liable for the performance of the said covenant when they ceased to be churchwardens and overseers; nor did they cease to be liable on the said covenant when they ceased to be churchwardens and overseers: that the

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proviso in the said indenture was repugnant to the said covenant, and void, and was an illegal and fraudulent attempt on the part of the defendants to render their successors, and the future inhabitants, liable for the said repairs of the said church, the price and value of which repairs the defendants were bound by law to retain, and, it must be presumed, did retain, out of moneys in their hands, before and at the time of making the said indenture: that it did not appear, in or by the said first plea, that the said other defendants, or any or either of them, ever were churchwardens and overseers; and that the averment in the same plea, that the defendants had ceased to be churchwardens and overseers, was uncertain, and tended to raise an immaterial issue, and was consistent with the fact of some of the defendants still being churchwardens and some of them, overseers. Joinder.

The plaintiff also demurred specially to the second plea, alleging for causes, that it was not by the indenture and the covenant of the defendants mentioned in the declaration, a condition precedent to the payment of the said sum of 389*l.* 13*s.* 4*d.* therein mentioned, that the plaintiff should, within the space or time of five calendar months from the day of the date of the said indenture, do, perform or execute, or cause or procured to be done, performed or executed, in and to the said parish church, all the works and repairs covenanted and agreed by the plaintiff to be done, performed and executed; nor did the plaintiff, by the said indenture, covenant to do, perform or execute, or to cause to be done, performed or executed, all such works and repairs within such space of time; that the plea was immaterial in this, to wit, that it tied the plaintiff to prove a *strict and literal* performance of all the works and repairs covenanted to be done, within the said space of time; whereas, a substantial performance of such works was sufficient, within the true intent and meaning of the said

indenture; that it was not necessary that *all* the works and repairs should be done, if the works and repairs were finished and completed within such time in a good, proper, workmanlike, and substantial manner, to the satisfaction of the said architects, fit for use and divine service to be performed in such church; that the said works and repairs might have been so finished within such time, though all the works and repairs might have been done within such time, and yet the same might not have been finished and completed in manner aforesaid, according to the said covenant; that, therefore, whichever way a jury should find any issue joined upon the second plea, such finding would be immaterial, and not decisive of the cause; and that the plea introduced new matter, and should have concluded with a verification, and not to the country. Joinder in demurrer.

The defendants demurred to the replication to the first plea, assigning for causes, that the said replication was an argumentative traverse of all the defendants having ceased being churchwardens and overseers, as in the first plea alleged; that the replication afforded no answer to the plea, inasmuch as allowing that the said *J. Simmonds* continued churchwarden, and that the said *S. Boxall* continued overseer of the poor, as in the replication was alleged, yet that afforded no ground for the joinder of the other defendants in the action.

Joinder in demurrer.

Manning Serjt. (with whom was *Shee* Serjt.) in support of the demurrers to the pleas. The question on the first plea is, whether the proviso therein set out, is not wholly repugnant to the covenant which it professes to qualify. The covenant is clearly a personal contract on the part of the defendants. It is true that they are *described* as churchwardens and overseers; but neither in the one character nor in the other, had they capacity to contract.

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And even if as churchwardens *or* as overseers they could have contracted, they have clearly no *joint* capacity to do so. Their description, therefore, must be rejected; and the covenant must be read as if the defendants had contracted, generally and personally, that the churchwardens and overseers should do the acts specified. Having entered into such a personal covenant, the proviso by which it was sought to relieve them from all individual liability, is void — first, because it is utterly repugnant to, and at variance with, the covenant; and, secondly, inasmuch as the defendants thereby seek to do what the law will not allow, namely, to bind the future churchwardens and overseers of the parish. Lord *Coke*, in commenting upon one of the sections in *Littleton* (s. 220.), says 146 *a*., "By this section it appeareth, that when, in a general grant, the law doth give two remedies, the grantor may provide that the grantee shall not use one of them, and leave the party to the other. But where the grantee hath but one remedy, there the remedy cannot be barred by any proviso; for such a proviso should be repugnant to the grant." So also, in *Sir Anthony Mildmay*'s case (*a*), it is laid down that "a proviso good at the beginning, by consequence may become repugnant; as if a man by his deed grants a rent for life, proviso that it shall not charge his person, this is a good proviso; yet if the rent is in arrear, and the grantee dies, his executors *shall* charge the person of the grantor in an action of debt; for otherwise they would be without remedy; and therefore now it is become repugnant and, by consequence, void." Here, the repugnancy is immediate and contemporaneous with the covenant, and renders the proviso void; for if the proviso were to have any operation, it would wholly release the defendants from their liability. If churchwardens could be charged

(*a*) 6 *Co. Rep.* 41 *b*.

as such, the charge would, in effect, be on the parish fund; but there is no power, neither is it legal, to throw any liability on future parishioners. In *Dyer*, 9. *b. Anon.* 19 *H.* 8. it is said, "that if a man appoint *A.* and *B.* executors, with a proviso *that B. do not administer*, the proviso is void, and they shall sue jointly." Two feoffees granted *custodiam parci* of *A.* to *W. N. capiendo feodo quod J. S. nuper parcarius cepit, proviso quod scriptum non extendat ad onerandum* one of the grantors; and this proviso was held void; for this restrains all the effect of the grant against him." *Bro. Abr. Conditions*, pl. 238., *Vin. Abr. Condition*, (A a) pl. 10. In *Jenk. Cent.* 96. pl. 86. it is said, "*A.* makes a feoffment of land to *B.*, with warranty; proviso that the warranty shall be void: this is a void proviso; as in a deed, an habendum which is repugnant to the premises is void; for both being in one instrument where the latter clause is repugnant to the former, the latter is void." So, in *Mary Portington's* case (*a*), it is laid down, "Suppose that a man makes a gift in tail, and further grants that he may make leases for years or lives, according to 32 *Hen.* 8. *c.* 28., or to levy a fine with proclamation, according to the acts in such case, to bar his issue, *provided always, that he shall not make leases or levy a fine;* none will deny, but such proviso would be repugnant." In Sir *John Davis's Reports*, 34. *b.* it is stated, "If a feoffment be made to *J. S.* and his heirs, with a proviso that his daughters shall not inherit, such proviso is void." Also in *Vin. Abr. Condition* (Z), pl. 11. (quoting from *Bro. Abr. Conditions*, pl. 116.) it is said, that "if a man aliens in fee, upon condition that if the feoffee or his heirs make any assignee the feoffee or his heirs may enter, this is a void condition; for it is repugnant to the estate." So, in *Jenk. Cent.* 242. pl. 26. (*b*) it is laid down, that "a con-

(*a*) 10 *Co. Rep.* 35 *a.* (*b*) *S. C. Dyer*, 343.

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dition annexed to an estate-tail that the unmarried donee shall not marry, is void; for without marriage he cannot have an heir of his body." In *Co. Litt.* 206. *b.* it is said, that "if a man make a feoffment in fee, upon condition that he shall not alien, this condition is repugnant and against law, and the estate of the feoffee is absolute. But if the feoffee be bound in a *bond* that the feoffee or his heirs shall not alien, this is good, for he may, notwithstanding, alien if he will forfeit his bond that he himself hath made. So it is, if a man make a feoffment in fee upon condition that the feoffee shall not take the profits of the land, this condition is repugnant and against law, and the estate is absolute. But a bond with a condition that the feoffee shall not take the profits, is good. In *The King* v. *Stevens* (*a*), it was held that an allegation, sensible in the place in which it occurs, and not repugnant to *antecedent* matter, is to take effect, though repugnant to *subsequent* matter. [*Tindal* C. J. Is the proviso actually *repugnant* to the covenant, or is it intended merely to make the plaintiff look for payment to *a particular fund?* *Cresswell* J. The defendants do not covenant to pay out of any particular fund.] That the defendants could not charge their successors and the future funds of the parish, or make a retrospective rate for the purpose of reimbursing themselves, has been established by numerous cases, *Tawney's* case (*b*), *Dawson* v. *Wilkinson* (*c*), *Rex* v. *The Churchwardens of Bradford* (*d*), *Rex* v. *The Churchwardens of Dursley* (*e*); all of which were reviewed by the court of Exchequer Chamber in the *Braintree* case. (*g*) Another objection to the first plea is, that

(*a*) 5 *East*, 244. *S. C.* 1 *J. P. Smith.* 437., 3 *J. P. Smith*, 366.

(*b*) 2 *Ld. Raym.* 1009., 2 *Salk.* 531., 6 *Mod.* 97.

(*c*) *Cas. temp. Hardw.* 381.

(*d*) 12 *East*, 556.

(*e*) 5 *A. & E.* 10., 6 *N. & M.* 333.

(*g*) *Veley* v. *Burder*, in error, 12 *A. & E.* 265., 4 *P. & D.* 452.

although it alleges that the defendants had ceased to be churchwardens and overseers, it does not state that they had not retained sufficient money in their hands to pay the plaintiff. The plea is also bad in this respect,—that it does not aver that the defendants are neither churchwardens nor overseers, but states that they are not churchwardens *and* overseers. Consistently with this allegation, some of them may be churchwardens and the rest, overseers.

The second plea is undoubtedly bad; for it assumes, that it is a condition precedent to the plaintiff's right to receive payment, that the whole of the works and repairs should have been completed within five months. It is unnecessary to cite cases to shew that this proposition cannot be maintained. *Dallman* v. *King* (*a*) may, however, be mentioned, as strongly in point. Moreover, if there had been any thing in this objection, the plea should have concluded with a verification, inasmuch as it introduces new matter. (*b*)

With respect to the replication to the first plea, it is not meant as an answer to the whole plea, but only to so much of that plea as relates to the defendants *Simmonds* and *Boxall*. Supposing them to continue liable, and the rest of the defendants to be discharged, the bringing of the action against the whole of the defendants is not a misjoinder—it is a joinder of parties who, originally liable, may be discharged by matter *ex post facto*. [*Tindal* C. J. Is it not a singular thing to divide a plea in this manner?] An objection might possibly have been raised to it; but none has been taken.

Channell Serjt. (with whom was *Byles* Serjt.) for the defendants. It must be admitted that the second plea is open to the objection which has been taken to it.

(*a*) 4 *New Cases*, 105., 5 *Scott*, 382.

(*b*) *Vide post.*

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But it is submitted that the first plea furnishes a good defence to the action. In *Mildmay's* case, and the other cases cited, the grant or covenant was at first absolute. But the very question here is, whether the covenant was or was not absolute; *2 Wms. Saund.* 234 n. (*c*) The covenant is to be construed according to its legal effect. This is not a covenant entered into by the defendants, by name. [*Cresswell* J. In what event do you say the plaintiff might have sued?] If the whole of the defendants had continued in office, it could not have been successfully contended that they were not liable. The proviso is to be read in connection with the covenant, as explaining the intention of the parties. Although it may be admitted that the defendants would have continued responsible if the whole of the debt had accrued while they remained in office, the understanding of both parties clearly was, that the plaintiff was not to look to the defendants if they did not continue in office, but was to seek for payment from their successors, who are distinctly referred to in the deed. [*Erskine* J. Do you say that this is a distributive covenant for payment, by the defendants, of all instalments falling due while they remain in office, and by their successors, of all future instalments?] It is submitted either that the covenant may be taken distributively or that the words raise an ambiguity which will let in the proviso by way of explanation. Looking at the covenant as distributive, the proviso will operate, not as an exception, but as a limitation; for a remedy is still given for sums accruing while the defendants continue to be churchwardens and overseers. Suppose the covenant itself had been, that the defendants would pay provided they remained in office or had funds, the plaintiff would have had a *possible* remedy under it. The cases cited on the other side apply only where the proviso is in *total* destruction of the covenant. Why should it be

supposed that the defendants entered into a covenant imposing risk on themselves and none on the plaintiff? The parties had to deal with a matter difficult of execution, and each side must be presumed to take upon itself a certain risk; and should the covenant be held to be personally binding on the defendants, only while they remained in office, the plaintiff is to be considered as having agreed to take the chance of the work being completed during the period the defendants continued churchwardens and overseers. [*Erskine* J. Suppose one of the defendants to go out of office, then, according to your argument, their personal covenant would cease. Do you say, taking the covenant and proviso together, that if five of the defendants continue in office, they must pay? *Cresswell* J. Suppose the six had gone out of office, and been re-appointed, would they hold the *same* office?] No. [*Cresswell* J. Would they then be liable as their own successors?] It is apprehended not. [*Tindal* C. J. You want us to read this as a covenant to pay only if there are funds.] The intention clearly is, that the defendants, if they are to be held personally liable, are to be so only so long as they remain in office. Supposing those who continue in office to be alone liable, the plaintiff cannot have judgment on this record, as he has sued the whole six; for the rule in actions on contracts is, that if you sue too many defendants, you must fail. If the construction of the covenant now contended for be right, then some of the defendants have ceased to be parish officers and are not liable. It is the same as if the objection was, that the declaration did not contain an averment that they did continue in office. This case is distinguishable from *Rew* v. *Pettet* (*a*); for there the defendants did not sign the promissory notes *as* churchwardens, &c., but

(*a*) 1 *A. & E.* 196., 3 *N. & M.* 456.

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those words were merely added as the description of the parties. There is no magic in the word "proviso." It may be either an explanation of the covenant or an exception out of it; and the rule as to when it is to be stated by the plaintiff and when by the defendant is laid down in *Thursby* v. *Plant* (*a*).

With respect to the replication to the first plea, the defendants having pleaded jointly, the plaintiff has no right to reply distributively.

Manning Serjt. in reply. The rejection of repugnant conditions and provisoes is not confined to cases where they would destroy the effect of the *whole* of the previous matter, but applies equally where part only would be rendered nugatory. The ground of rejection is, not that it is opposed to all, but that it is inconsistent with something, that has gone before. With respect to the argument, that the defendants are liable only so long as they remained in office, it is absurd to suppose that the plaintiff would agree, that the payment of his work should depend upon the contingency of the defendants' remaining in office. The replication, it is submitted, is good. [*Tindal* C. J. Nothing will turn upon it.]

TINDAL C. J. It appears to me that the question in this case will depend substantially on the declaration; for, as the proviso is set out on oyer of the indenture, it is the same in effect as if the whole deed had been stated in the declaration. The question is, whether, taking the covenant and proviso together, the plaintiff has any cause of action. The covenant is as follows. [Here, his lordship read the covenant.] The first question is, whether this is a personal covenant, or is it a covenant by the defendants as a corporate body. It

(*a*) 1 *Wms. Saund.* 234.

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must fall within the one class or the other. Churchwardens and overseers, though they are by statute a corporate body for some purposes, cannot enter such a covenant as this in a corporate character; and if not, then the contract must be a personal covenant. If it be, the next question is, what does it bind the defendants to do? At all events, it binds them, while they remain in office, to pay. Looking at the proviso, however, it is utterly inconsistent with the covenant. [Here, his lordship read the proviso.] Therefore, if the defendants have entered into a covenant which, to any extent, binds them personally, this proviso is at variance with such covenant, and consequently must be rejected as repugnant according to the authorities cited. If the proviso is rejected, then the first plea is no answer to the action. With respect to the last plea, no attempt has been made to support it. Therefore, as regards both, the plaintiff is entitled to judgment. It would have been a different thing if the defendants had so shaped their covenant as to make the payment come only out of the parish fund.

COLTMAN J. When we look at the covenant by itself, it is clearly a personal covenant. It has been said, that although what is called the proviso is, in terms, a proviso, it is to be construed as merely limiting the general words of the covenant. That might be so, if it could be shewn that there would still remain a personal liability in a given event contemplated by the parties. But the argument proceeds on a misapprehension of the proviso, which declares "that the covenant is not to be taken as a personal covenant, or to affect the defendants in their private capacity." Stopping there, the proviso would clearly be repugnant. It proceeds to say, however, "but shall be and is intended to be binding and obligatory upon churchwardens and overseers of the poor of the said parish of *St. Botolph*, and their successors, for the

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time being, as such churchwardens and overseers of the poor, but not further or otherwise." This latter part is supposed to explain the covenant by limiting its personal effect to the time that the defendants remain in office. But that I think was not the real meaning of the parties. The intention obviously is, that no one shall be *personally* liable; which imports, in truth, that there shall be no liability at all.

ERSKINE J. The covenant by the defendants clearly constitutes a personal liability; for though they are described to be churchwardens and overseers, they covenant for themselves *and* for their successors. The part in which they covenant for the latter is of no avail, and may be struck out. Then what do they undertake on their own part? To pay for the work by the stipulated instalments. It is said that the proviso qualifies the full extent of the covenant, and gives it a *limited* construction. If that had really been so, I should have thought the argument a sound one; but when the proviso is examined it is utterly inconsistent with any personal liability whatever. The only part of it which, according to the argument, would be effective is that which declares that the covenant is intended to be binding on the defendants and their successors in their official character only. But that is a direct contradiction to the covenant. I cannot see, therefore, how the covenant and proviso can be construed together, so as to create the limited liability now contended for. My brother *Channell* was obliged to admit that, supposing his view was correct, the covenant would cease to operate if any one of the defendants went out of office; but it is highly improbable that any one would enter into such a contract. The defendants appear to have intended to bind the funds of the parish; but they have attempted to do that in a manner in which such an intention cannot be carried into effect.

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CRESSWELL J. I am of the same opinion. The defendants first enter into a clear personal covenant, and then they endeavour, by the proviso, to relieve themselves from all personal liability.

Judgment for the plaintiffs.

Channell Serjt. then prayed for leave to withdraw the pleas, and pay money into court to cover the third instalment and also any claim for the additional works and repairs. A rule nisi having been granted,

Manning Serjt., on a subsequent day, shewed cause, submitting that the amendment would go beyond the pleas on which the former argument turned.

The court, however, made the rule absolute.

EDGER, Esquire, *v.* KNAPP, D.D.

May 3.

ASSUMPSIT, for money paid, and upon an account stated.

Plea: non assumpsit.

A. and *B.*, directors of a joint-stock company, being sued for debts due from, and for damage done by, the company, employ *C.* to defend them upon their joint responsibility.

At the trial at the *London* sittings after *Michaelmas* term 1842, before *Tindal* C. J., it appeared, that in 1836 a joint-stock company was formed for the purpose of obtaining an act for the formation of one of several competing lines of railway from *London* to *Brighton*. After an ineffectual attempt to carry their bill through the

A. pays the whole of *C.*'s bill of costs. Held, that an action is maintainable by *A.* against *B.* for contribution.

Where the plaintiff had been nonsuited upon the opening speech of his counsel, and it afterwards was shewn by affidavit that his witnesses could have proved a good cause of action not stated in the opening speech, the court granted a new trial upon payment of costs.

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House of Commons, the company coalesced with the supporters of rival lines, and an act was obtained under which the present railway was constructed. A call of 6*s.* per share was made for the purpose of defraying the expenses of the now dissolved company, but several claims were made which it was thought advisable to resist. Some of these defences the company failed in supporting; in others, which were successful, the plaintiffs were unable to pay the defendants' costs. Messrs. *Pearson* and *Wilkinson*, the attorneys of the company, being unwilling to embark in these proceedings upon the responsibility of a numerous floating body of shareholders, took the precaution to obtain a retainer from four members of the company, viz. the plaintiff, the defendant, Sir *John T. Claridge*, and Mr. —— *Solani*. In opening the case to the jury, *Shee* Serjt. did not state the retainer, respecting which his instructions were silent, Messrs. *Pearson* and *Wilkinson* not having been previously examined by the plaintiff's attorneys. During the examination of *Pearson*, the first witness for the plaintiff, the learned judge was of opinion that, on the opening speech, the action must be taken to be a proceeding by one partner against another upon an open unsettled partnership account. He therefore nonsuited the plaintiff.

In *Michaelmas* term following *Shee* Serjt. obtained a rule nisi to set aside the nonsuit, and for a new trial, upon an affidavit made by *Pearson*, in which it was stated that *Pearson* and *Wilkinson* were appointed solicitors to the company, upon an agreement that, provided the directors made advances for the costs out of pocket, and paid the bills monthly, *P.* and *W.* were to debit the *funds* of the company, and not the directors. In 1837 the funds of the company were nearly exhausted; *P.* and *W.* accepted 300*l.*, part of such funds, in discharge

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of the directors; the balance in hand was applied towards the liquidation of the debts; and the company was dissolved. Various demands by engineers, &c. were made upon the then late directors of the company, exceeding 6000*l.* Some of these claimants were then suing some of the directors. *P.* and *W.*, being cognizant of the transactions, were employed to defend these actions, upon an understanding and agreement, with all the parties, such defences were undertaken upon the responsibility of the defendants, and not upon the credit of the company, which had been dissolved when the greater part of the actions were commenced. In almost all the cases, though the defendants were successful, the plaintiffs were insolvent, and *P.* and *W.* looked to the defendants for their costs. Advances were made by each of the parties sued, in various sums, as the causes proceeded; and, in the end, signed bills were delivered to them. Actions would have been brought for the amount, but *Edger* obtained an order for the taxation of the bills upon the usual undertaking to pay the balance. The balance found to be due to *P.* and *W.* amounting to between 500*l.* and 600*l.*, was paid by *Edger*.

Bompas Serjt. shewed cause. The plaintiff and the defendant and other persons were partners; and until an account is taken it cannot be ascertained what each is to receive or pay. The account can be taken only in an action of account, or upon a bill filed in Chancery for an account. [*Cresswell* J. Suppose four persons to be sued in respect of a partnership transaction, in which other partners are concerned, and the debt is levied upon one of the defendants, would he not be entitled to contribution against his co-defendants?] It is submitted that he would not. [*Erskine* J. The question is, whether he would not be entitled to contribution where there was a special agreement between them; whether one of four

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partners sued would not be entitled to contribution against his co-defendants upon a special agreement to employ the same attorney for their mutual defence.] The cases cited at nisi prius were *Holmes* v. *Higgins*(*a*) and *Milburn* v. *Codd.* (*b*) In the former of these cases it was held that an agent for a railway bill, who was himself a subscriber to the undertaking, could not maintain an action against the chairman of the committee for his agency; in the latter, an attorney, who was a member of a trading company, was employed by two other members of the company to defend an action brought against the two; he was held not to be entitled to sue the latter for his costs, being, as a member of the company, liable to bear his proportion of their costs. These cases have been followed and confirmed by *Neale* v. *Turton* (*c*), in which some circumstances occurred very much stronger than the present. In that case a shareholder in a joint-stock company sued the directors of the company upon two bills of exchange, drawn by him upon the secretary of the company on account of goods supplied to the company by the plaintiff, and accepted by the secretary. It was held that the plaintiff, being a partner, could not sue. So, here, the plaintiff has paid bills on account of the company. *Goddard* v. *Hodges* (*d*) and *Teague* v. *Hubbard* (*e*) are authorities to the same effect. The payment made by the plaintiff was on account of the company of whom he was a member. [*Cresswell* J. That appears to me to be the question in the cause. Suppose the party to say "I will sell to you two, and will not sell to the company?"] Here, the parties were sued as members of the company. Some of the actions were against four, some against three, some

(*a*) 1 *B. & C.* 74., 2 *Dowl. & Ryl.* 196.

(*b*) 7 *B. & C.* 419., 1 *Mann. & R.* 238.

(*c*) 4 *Bingh.* 149., 12 *J. B. Moore*, 365.

(*d*) 3 *Tyrwh.* 209., 1 *C. & M.* 33.

(*e*) 8 *B. & C.* 345., 2 *Man. & R.* 369.

against two. In many insurance companies the policies are signed by three of the directors; but they are not the less the contracts of the company. Here, several calls had been made; some of the shareholders have paid more, some less. Is there to be a second action for contribution in respect of this difference in the payments? Some of the actions defended by these parties were brought, not upon contracts, but for damage sustained through the operation of the company. [*Tindal* C. J. If the plaintiff can shew that the four agreed to treat their defence as a separate job, if such an expression may be used, the case will not fall within the general rule.] There is no evidence of any such contract. [*Erskine* J. The case was stopped.] But not without giving full effect to every thing which my brother *Shee* said he could prove. [*Tindal* C. J. Four persons being sued for a debt which they have contracted jointly with others apply to *Pearson* and *Wilkinson* to defend them.] The learned serjeant cited *Fox* v. *Clifton* (*a*), *Kempson* v. *Saunders* (*b*), *Wright* v. *Hunter* (*c*), *Howell* v. *Brodie* (*d*), *Holmes* v. *Williamson*. (*e*)

Shee Serjt. (with whom was *White*), in support of the rule. *Frustra petit qui mox restituturus est* (*g*); and therefore one partner cannot sue another in respect of a partnership transaction. But this was not a partnership transaction. In the first place, there was no partnership, since, until an act of parliament was obtained, the projected company could not be formed. Secondly, supposing a company to have been constituted, it appears,

(*a*) 6 *Bingh.* 776., 4 *M.* & *P.* 676.

(*b*) 4 *Bingh.* 5., 12 *J. B. Moore*, 44., 2 *Carr.* & *P.* 366.

(*c*) 1 *East*, 20.

(*d*) 6 *New Cases*, 44., 8 *Scott*, 372.

(*e*) 6 *M.* & *S.* 158.

(*g*) As to this maxim in the form of *Frustra petis quod statim alteri reddere cogeris*, see *Jenk.* 256. pl. 49., where it was applied to an appeal of mayhem by a villein against his lord.

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from the affidavit of *Pearson*, that the payment to him and his partner was made upon a distinct collateral contract. [*Cresswell* J. For the defendant it is contended, that the payment was made on behalf of the partnership.] If the four had been sued by *P.* and *W.*, the non-joinder of the other shareholders could not have been pleaded in abatement. [*Tindal* C. J. That may be true as against *P.* and *W.*, although the four may not be entitled to contribution *inter se*. The question here is, whether, as between themselves, it was made a separate transaction.] *Pearson* refused to undertake the defence except upon the personal retainer of the four defendants. It is not to be assumed that the defence was for the benefit of the company. [*Tindal* C. J. You must make out that the partners agreed to contract for themselves personally, without looking to the partnership. *Cresswell* J. I do not agree that you are *entitled* to have a new trial. *Tindal* C. J. The action for money paid to recover contribution is founded upon the old writ *de contributione faciendâ;* of which it is said, in *Fitzh. N. B.* 378. (*a*), "And if there be three or four coparceners of lands, and the eldest sister do the suit to the lord of whom the lands are holden for all the coparceners, and the others will not allow her for her charges and losses (*b*), according to the rate (*c*), for the same suit, that coparcener who did the suit may have this writ of contribution. And if there be many coparceners, and the eldest does the suit, and the other coparceners agree with the eldest for a rate, now the writ of contribution shall be brought against the others, and who would not contribute, &c. (*d*) And if many be infeoffed

(*a*) In the quarto edition, but in the last *English*, following the *French* editions, p. 162.

(*b*) *Pur ses charges perde.*

(*c*) *Solonque lour rate*, i. e. according to their proportion.

(*d*) This materially varies from the original, upon the very point for which it is cited. What *Fitzherbert* says is this: "And if there be many coparceners, and the eldest does the

of land for which one suit ought to be done, now if they agree amongst themselves that one of them shall do the suit, and the others shall contribute unto him, if he do the suit, and afterwards the others will not allow him for that suit according to their rate, then he shall have the writ of contribution against them, and the writ shall mention the agreement, &c. And if they cannot agree, then the lord shall distrain them all for all their suits, if the suit be not done. But if one feoffee, of his own will, do the suit for them all without any agreement for the same made between them, the lord cannot then distrain the others for the suit; for as to the lord it is not material whether there be any agreement between them or not, but between the feoffees, he that did the suit shall not have the writ of contribution against his companions without agreement thereof made betwixt them." (*a*) So here, in order to entitle the plaintiff to recover against the defendant, he was bound to shew a contract independent of the relation of partner. However, upon payment of the costs of the trial, the nonsuit may be set aside, and the plaintiff let in to try the cause again.]

Per curiam.

Rule absolute for a new trial. (*b*)

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suit, and *some* [*ascuns*] coparceners agree with the eldest for their proportion, now the writ of contribution shall be brought against the *others* who would not make contribution." By which it would appear that not the assenting, but the dissenting, coparceners were to be compelled to contribute by writ.

(*a*) From this extract, as corrected from the *French* original (see last note), it appears that a coparcener distrained upon is entitled to contribution without any agreement; and it may be inferred that a joint-feoffee is not. The reason for this distinction probably is, that the coparcener comes in by act of law, whilst the joint-feoffee comes in by his own act, and might have protected himself by stipulation or covenant at the time he accepted the estate.

(*b*) This cause was tried a second time before *Maule* J., at the sittings after *Easter* term 1843, when the plaintiff obtained a verdict, which the court refused to disturb.

See further, as to contribution,

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Sadler v. *Nixon*, 5 *B. & Ad.* 936.; *S. C. per nomen*, *Sadler* v. *Hickson*, 3 *N. & M.* 258. See also *Rastall's Entries*, 161.; *Vet. Int.* 42.; *Philips* v. *Biggs*, *Hardres*, 164.; *Offley and Johnson's Case*, 2 *Leon.* 166.; *Anon. Sir F. Moore*, 136. No. 280.; *Anon.* 2 *Ventr.* 348.; *Walton* v. *Hanbury*, 2 *Vern.* 592.; *Parsons* v. *Briddock*, *Ib.* 608.; *Cowell* v. *Edwards*, 2 *Bos. & Pull.* 268.; *Deering* v. *Earl of Winchelsea*, *Ibid.* 270.; *Graham* v. *Robertson*, 2 *T. R.* 282.; *Brand* v. *Boulcott*, 3 *Bos. & Pull.* 235.; *Osborne* v. *Harper*, 5 *East*, 225., 1 *J. P. Smith*, 411.; *Kelby* v. *Steel*, 5 *Esp. N. P. C.* 194.; *Dobson* v. *Wilson*, 3 *Campb.* 480.; *Lloyd* v. *Sandilands*, *Gow. N. P. C.* 13.; *Betts* v. *Drewe*, 2 *A. & E.* 57., 4 *N. & M.* 64.; *Dimes* v. *Arden*, 6 *N. & M.* 494.; *Bac. Abr. Obligation* (D), 5.

May 5.

CHARLES THARPE, and Sarah his Wife, Administratrix of LETITIA EVANS deceased, *v.* STALLWOOD and Another.

An administrator may maintain *trespass* for acts done after the death of the intestate, and before the grant of administration.

The rule that a party cannot be made a trespasser by relation, is only applicable where the act complained of was lawful at the time.

TRESPASS, for taking certain goods and chattels of the plaintiff *Sarah*, as administratrix &c., and carrying away the same &c.

Plea, not guilty, "by statute."

At the trial, before *Tindal* C. J., at the sittings for *Middlesex* after last term, the following facts appeared in evidence: — One *Cole* was tenant to the defendant *Stallwood*, of a house in which the intestate had occupied an apartment. She died in *June* 1842, possessed of certain household furniture in the apartment in question. On the 28th of *July* the furniture was seized by *Stallwood* and the other defendant (a broker), as a distress for rent alleged to be due from *Cole* to *Stallwood*; some of the furniture being at the time of the seizure off the premises, as the plaintiffs were in the act of removing it at the time. On the 29th administration

The court will not grant a new trial upon the ground of surprise, merely because the unsuccessful party has neglected properly to instruct his attorney.

of the estate and effects of the intestate was granted to the female plaintiff. The defendants failed to prove the tenancy of *Cole*, it appearing that it was under a written agreement, which was not produced. It was then contended on their behalf that *trespass* would not lie by an administrator for an act done before the date of the letters of administration. Leave was reserved to the defendants to move to enter a nonsuit upon this point; and the plaintiffs obtained a verdict for 21*l.*

Bompas Serjt., on a former day in this term (20th of *April*), moved accordingly. He submitted that there was a distinction between *trespass* and *trover*. The latter may be supported by an administrator for a conversion before the grant of administration; but the right to bring trespass stands upon a different footing. He cited *Cooper* v. *Chitty* (*a*), *Smith* v. *Milles* (*b*), *Carlisle* v. *Garland* (*c*), and *Balme* v. *Hutton*. (*d*) Although it is said in 1 *Williams on Executors* (*e*) (citing *Long* v. *Hebb* (*g*), 2 *Roll. Abr.* 399., tit. *Relation* (A.), pl. 1. (*h*), *Anon.* (*i*), *Selw., N. P.* (*k*), and *Patten* v. *Patten* (*l*)) that "an ad-

(*a*) 1 *W. Bl.* 65., 1 *Burr.* 20.

(*b*) 1 *T. R.* 475.

(*c*) 7 *Bingh.* 298., 5 *M. & P.* 102., *S. C. in Cam. Scac,* 10 *Bingh.* 452., 4 *M. & Sc.* 24., 2 *C. & M.* 31., 3 *Tyrwh.* 705.; in *Dom. Proc.* 4 *New Ca.* 7., 4 *Scott,* 587.

(*d*) 9 *Bingh.* 471., 3 *M. & Sc.* 1., 1 *C. & M.* 262., 2 *Tyrwh.* 620.

(*e*) Page 493. 3d ed.

(*g*) *Style,* 341.

(*h*) Thus rendered in 18 *Vin. Abr.* 285. same tit.: —

"If a man dies possessed of certain goods, and after a stranger takes and converts them to his own use, and then administration is granted to *J. S.*, this administration shall relate to the death of the testator, so that *J. S.* may maintain an action of trover and conversion for this conversion before the administration granted to him. *Trin.* 10 *Car. B. R.*, between *Locksmith* and *Creswell*, adjudged; this being moved in arrest of judgment, after verdict for the plaintiff. *Intratur, Hill,* 9 *Car. Rot.* 729."

(*i*) *Comb.* 451.

(*k*) Page 717. 6th ed.

(*l*) *Alcock & Nap.* 493.

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ministrator may have an action of *trespass* or *trover* for the goods of the intestate taken by one before the letters granted unto him;" yet the only case that supports the position as to *trespass* is the short note of *Long* v. *Hebb.* (*a*) [*Coltman* J. After a verdict for the plaintiff in ejectment, the lessor of the plaintiff may maintain an action for mesne profits antecedent to the day of the demise: how is that explained except upon the doctrine of relation?] The action of ejectment is altogether anomalous. [*Tindal* C. J. referred to *Com. Dig.* tit. *Administration* (B. 13.), where it is said that since the statutes 4 *Ed.* 3. *c.* 7. and 31 *Ed.* 3. *c.* 11., "an executor or administrator shall have trespass or *trover* for the goods of the testator taken in his life-time" (*b*); and his lordship observed, that it would be a strange anomaly to hold that an administrator could maintain trespass for an act done *before* the death of the intestate, and not for one done *afterwards.*]

The learned serjeant moved also, upon the ground of

(*a*) "In a trial between *Long* and *Hebb* and others, it was said by *Rolle*, Chief Justice, that letters of administration do relate to the time of the death of the intestate, and not to the time of granting them; and therefore an administrator may bring an action of trespass or a trover and [conversion for goods of the intestate taken by one before the letters granted unto him; otherwise there would be no remedy for this wrong done."

(*b*) Citing (*Wentw.*) *Off. Ex.* 98. *Moo.* 400. (*Harris* v. *Vandcogie*) *Cro. El.* 377. (*Elizabeth* Countess of *Rutland* v. *Isabel* Countess of *Rutland*, *S. C. Owen*, 156; Sir *F. Moore*, 266.) *Lat.* 168 (Dict. in *Mason* v. *Dixon*); and, 242 (Dict. in *Sale* v. *The Bishop of Coventry*); 1 *Leon*, 193, 194 (*Russell and Prat's* case.) The stat. 4 *E.* 3. *c.* 7. expressly gives an action to *executors* for *trespasses* done in the life of their testator. The case in Sir *F. Moore*, 400. is as follows: "*Pasch.* 37 *Eliz.* Between *Harris* and *Vandcogie* it was held that an *administrator* shall have *trespass de bonis asportat' in vita intest'* by the equity of the statute of 4 *E.* 3. *c.* 7., and the executor of an executor by the statute of 25 *E.* 3. *c.* 5."

The other authorities cited by *Comyns*, relate to the power of *executors* to maintain an action of *trover*.

surprise, on an affidavit of the defendant's attorney, stating that he had inquired of the defendant *Stallwood* whether *Cole* held under a lease or any written agreement, when the defendant informed him that *Cole* was merely a yearly tenant; and that the deponent had not the least idea of there being any written document between them. A rule nisi having been granted,

Shee Serjt. (with whom was *Wordsworth*) now shewed cause. Upon the ground of surprise, the affidavit is insufficient. It discloses a case of negligence, either on the part of the defendant *Stallwood* or his attorney; but that will not entitle him to a new trial. There is no affidavit by the defendant himself; and the one sworn does not even state that any rent was due. [*Tindal* C. J. It leaves us in complete doubt whether there was any written agreement or not.] The other is the material question in the case, namely, whether an administrator can maintain *trespass* for an act done to the intestate's estate after his death, but before the grant of administration. The defendants, by pleading *not guilty* only, have admitted the representative character of the female plaintiff, and that she was possessed of the property in that character. [*Tindal* C. J. The possession is undoubtedly admitted on the face of the record.] It will be contended, on behalf of the defendants, that in the case of an administrator, his title does not relate back to the death of the intestate, as it does in the case of an executor to the death of his testator; but if that were so, and an action would not lie in such a case as the present, it would be a striking instance of a wrong without a remedy, which the law abhors. But the distinction between executors and administrators in this respect does not exist; in *Com. Dig.* tit. *Administration* (B. 10.) it is said, "An executor or administrator has the property of the goods of his testator, or intestate,

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vested in him before his actual possession, and therefore may have *trover*, trespass, &c. against him who takes them before he has actual possession of them." (*a*) [*Cresswell* J. There is a case in *Fitz. Abr.* tit. *Administrators*, pl. 2. (*b*), citing *T.* (M.), 18 *H.* 6. 22. (*c*), where

(*a*) Citing *Cro. El.* 377. (*Elizabeth, Countess of Rutland*, v. *Isabel, Countess of Rutland.*)

(*b*) "Trespass *de bonis asportatis* brought by administrators. The defendant says that, before the administration to them committed, the ordinary delivered these goods to the defendant to re-deliver them; wherefore he took them, and afterwards re-delivered them to the ordinary, and afterwards the ordinary committed the administration of them to the plaintiffs &c., *without this*, that he is guilty after the administration: and the opinion was that it is a good plea; wherefore they accepted an issue upon this (*post* 773. (*a*)); and the opinion was that administrators have their power from the death of the intestate, and not from the commission, and [may] have action of those goods taken before the administration. Therefore *quære*, if a release made by them, before administration, be a bar, after the administration, of a debt or goods of the intestate &c."

(*c*) "A writ of trespass was sued by administrators, of goods which were of one *J.*, *qui obiit* intestate, and being in their custody; and they counted how the defendant took and carried them away &c. *Markham* Serjt. for the defendant. True it is, that he died intestate; but long time before the administration committed to you at *London* the administration was committed to us of the same goods whereof this action is conceived; by force whereof we demanded the same goods, and afterwards he committed the administration of the residue of the goods, which were of the testator [intestate] to you, by colour whereof you took the goods to you committed, and also the goods now in action, and we re-took them out of your possession, as it was lawful for us to do. Judgment, if wrong, &c. *Fortescue* Serjt., to *Markham*. How do you show the administration? *Markham*. That is not needful for us, for we plead by way of bar. *Fortescue*. It seems to me that this plea is sufficient enough as to that, notwithstanding that I am for the plaintiff. [He then gave his reasons.] Therefore if you wish this for a plea, we will imparle. *Markham* waived the plea [and pleaded as stated above in the note last preceding.] *Portington* Serjt. This plea does not amount to more than *not guilty after the administration committed*: but to my intendment that shall not be, for in this case the plaintiffs might have a general action of trespass (if they would) of their own *goods carried away*, as well as *this* action of trespass; in which case the plea

the question was raised as to the right of an administrator to maintain trespass under circumstances similar to those of the present case. But the objection was not

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which the defendant has pleaded would not be a plea, because that it amounts to nothing more than *not guilty* generally; and yet the plaintiffs had no cause of action, unless by cause of the administration, which shall have regard [relation] to the death of the man intestate. * * * * * *Fulthorp* Just. of C. P. There is a great diversity between a writ of *trespass of the goods* of the deceased *taken* out of the custody of executors, and out of the custody of administrators; for executors take their power from the death of their testator; in which case they may maintain an action for every trespass between the death of their testator and the commission of administration: but the administrators take their power from the time of the administration to them committed, wherefore they shall not have an action unless of trespass after the administration granted, because they take their power from the ordinary. *Paston* Just. of C. P. It seems to me that there is no diversity between executors and administrators as to that: for let us put that one makes you his executor, and dies, and certain goods which were the testator's are taken out of your possession,— before the administration, thereof you shall have a good writ of *trespass*, because the administration is committed to you; then, inasmuch as you are executor, and make me your executor, and die, shall now the action of *trespass* be gone; *Fulthorp*. No, sir, inasmuch as being executor, you shall have a good writ of *trespass* thereof. *Paston*. Well, sir, and yet the executor who took his power from the death of the testator paramount is dead: so in our case the ordinary took his power from the death of the testator [intestate]? Then *he* is as dead; and is restrained as to any administration by the ordinary as executor afterwards. Why, then, shall not an administrator have a writ of *trespass* of that which was done in the time of the ordinary, as the executor shall have of that which was done in the time of the other executor? *Quasi diceret*, that he should have. And so the executors and the administrators take their power from the time of the death after the administration has been committed to them. *Fortescue*. If I grant the reversion of my tenant for term of life, by a deed, and between the grant and the attornment the tenant does waste, this waste shall be dispunishable; for if after the attornment the grantee bring writ of *waste*, the tenant may show how at the time of the waste supposed, the reversion was in the grantor, and how by his commandment he did the waste, *without this*, that he did the waste after the attornment. So here, he has shown cause for having the goods before the administration committed to the plaintiffs, *without this*, that he is guilty after the administration com-

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put, as here, on the ground of any supposed distinction between *trespass* and *trover*; it rested entirely upon the question whether the property before administration

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mitted. So it seems that the plea is good enough. *Paston.* Suppose one makes his executors &c., then he dies testate; suppose then that the goods are taken out of their possession, and after the executors are willing to administer, and the ordinary commits the administration to them, shall not they have then an action for that which was carried away in the time of the ordinary? (*Q. d. quod sic.*) And yet, when the ordinary administered, he died intestate. Wherefore shall not they have administration and action in such case also? (*Q. d. quod*, they shall have.) *Fulthorp.* Sir, because when the executors have accepted the administration, then they shall be called executors from the time of the death of their testator: but it is not so of administrators, for they have not any power except from the ordinary, who has power between the death, &c. and the administration committed. *Ascough* Just. C. P. To my intendment, administrators are but deputies or servants of the ordinary, and that which they do is in right of the ordinary; and this is true that the ordinary shall have a writ of *trespass* for the goods of the intestate taken out of his possession. So, to my intendment the administrators have but the occupancy in his right. And it seems to me that this is not a plea as the defendant has pleaded here. * * * *Paston.* If there are two executors [and] one refuses the administration before the ordinary, and the other takes it, then I shall have a writ of *debt* against him who administers, alone, saying nothing of the other, or for a thing which I have delivered to the testator in his life to re-deliver to me, &c., which is now come into his hands as executor; and yet if the executors shall have regard (relation) to the death of their testator, I shall have an action against both executors. And, sir, for the same reason that I shall have a writ of *debt* against him alone, for the same reason he shall have *trespass* in his name alone against me for the *goods* of the testator taken before the administration committed and accepted; and this proves that the executors take their power from the ordinary, which is against your intendment. Wherefore then shall not the administrators take, *e contrà*, their power from the death of their testator? * * * *Fulthorp.* The executors take their effect upon the death of their testator, but it is upon a condition in *law*, viz. if they agree to the administration, and if not, then he who disagrees before the ordinary, as your case is, shall be taken and intended, as he had not ever been made executor. * * * But, Sir, in the case of administrators, they take their effect upon the commission of the ordinary, and there shall not be

vested by relation in the administrator after administration granted. The matter appears, from the report in the *Year Book*, to have been very elaborately, if not very satisfactorily, discussed. It is difficult, without some research, to make out which is judge and which is counsel. The question, however, seems ultimately to have been left in doubt. (*a*)] *Long* v. *Hebb* is a distinct authority in favour of the position contended for on behalf of the plaintiffs. The question was raised in *Bacon* v. *Simpson* (*b*), where the plaintiff was the widow and administratrix of an intestate. The action was brought upon an agreement to take a house, and the declaration stated that the plaintiff was *effectually possessed* of the house &c. (not saying in her representative character), which allegation was traversed. It appeared that the agreement was entered into some time before she took out administration; and it was objected, that these facts would not support the allegation of possession, inasmuch as at the time of the contract she had not taken out letters of administration, and there could be

any condition there although they agree or disagree at that time; and if they agree, this shall have no relation but only to the time of the commission, and namely, when a trespass is to be punished which commenced after the death of the intestate.* * * *Fortescue.* But to my intendment, although the *law* be such, &c. that administrators shall have an action for a thing done before the administration, as they well may to my intendment, because that when the administration is committed to them it is then to be intended as if there had been no mesne occupation by the ordinary, but it shall be as though the administration had been committed to them immediately after the death, &c. * * * And so in a writ of debt upon a bond made to the intestate in his life, the administrator shall have an action, and shall recover damages after the death of the intestate. So it seems that the law shall be such as I have said before." He then proceeds to give his reasons for thinking the plea under consideration good. The report ends with the plaintiff's joining issue on the plea by the usual "*et alii e contrà.*"

(*a*) The plaintiff withdrew his objection to the plea. See the last note, and *post*, 773. (*a*)

(*b*) 3 *M.* & *W.* 78.

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no title by relation back in such a case. But no opinion was given by the court upon this point. (a) *Bushe* C. J., in giving the judgment of the court in *Patten* v. *Patten* (b), after stating that there was undoubtedly some distinction between the relation on the grant of probate and on the grant of letters of administration, added, " On the other hand it is clear, that, to certain purposes, the grant of administration has a relation to the time of the intestate's death; that it gives him a title to the chattels, real and personal, from the time of the intestate's death, as laid down in Lord *Ellenborough's* judgment in *The King* v. *The Inhabitants of Horsley.* (c)" In the last mentioned case it was held that a sole next of kin had such an equitable interest in a leasehold tenement of an intestate, as to gain a settlement by residing forty days after the intestate's death before administration granted. *Cooper* v. *Chitty*, *Smith* v. *Miller*, and the other cases cited when the rule was moved for, do not establish any such distinction between *trespass* and *trover* as is now contended for on the part of the defendants.

Bompas Serjt. in support of the rule. The defendants are at liberty to dispute the title of the female plaintiff as administratrix, as the plea of " not guilty by statute " puts all special matters in issue; *Fisher* v. *The Thames Junction Railway Company.* (d) [*Cresswell* J. That was settled in *Ross* v. *Clifton.* (e)] The distinction between *trespass* and *trover* was fully discussed and recognised in the cases of *Carlisle* v. *Garland* and *Balme* v. *Hutton.* In the last-mentioned case, which was *trover* by the assignees of a bankrupt against a sheriff, for

(a) *Doe dem. Hornby* v. *Glenn*, 1 *A. & E.* 49., 3 *N. & M.* 837., and *Middleton's* case, 5 *Co. Rep.* 28., were cited in support of the proposition.

(b) *Alc. & Nap.* 493. 504.

(c) 8 *East*, 405. 410.

(d) 5 *Dowl. P. C.* 773.

(e) 11 *A. & E.* 631., 1 *G. & D.* 72., 9 *Dowl. P. C.* 1033.

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goods seized after an act of bankruptcy, but before the commission, *Patteson* J., in giving the judgment of the court of Exchequer Chamber, made these remarks:—"The action of *trover* is founded on property; and as the assignees have the property by relation, it follows that they can maintain this action against any person who has converted the goods in the interval between the act of bankruptcy and the action." "The action of *trespass* is very different: it is founded not on property, but on possession; and, where there is no actual possession, but right of property is said to draw to it possession, that is only where the plaintiff has a right of possession at the time of the trespass: here, he had no such right, except by relation; and the cases establish that a man shall not be made a trespasser by relation. (*a*) There is reason in such a rule; for in trespass, the damages are unlimited: in trover, they are limited to the value of the property." No argument has been urged on the other side to shew that this principle, laid down in cases of actions by assignees against a sheriff, does not apply to the case of an administrator. His rights stand upon a very different footing from those of an executor. The appointment of an administrator is the act of the ordinary: the appointment of an executor is the act of the testator. In the former case it is not certain to whom the ordinary may grant administration. An administrator cannot release or distrain before administration, though an executor may; *Middleton*'s case (*b*); *Doe d. Hornby* v. *Glenn* (*c*); *Whitehall* v. *Squire* (*d*); *Waring* v. *Dewberry*. (*e*) [*Tindal* C. J. The meaning of the doctrine that a man shall not be made a

(*a*) *Vide post.* 777. (*a*).
(*b*) 5 *Co. Rep.* 28 *a.*
(*c*) 1 *A. & E.* 49., 3 *N. & M.* 837.
(*d*) 1 *Salk.* 295.
(*e*) *Gilb. Eq. Rep.* 223., cited 1 *Stra.* 97., *Fortescue*, 360., 11 *Vin. Abr.* tit. *Executor* (Q.), pl. 29. See 1 *Wms. Executors*, 494. 3d ed.

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trespasser by relation is, that an act which was lawful the time shall not be made unlawful by relation (*a*); t that can hardly apply where a party was clearly a wro doer at the time the act was done. The question h is, in whom was the legal possession of the intesta property, from the time of the decease. *Cresswell* In *Roll. Abr.* tit. *Trespass* (T.), pl. 2. there is the foll ing authority, which is precisely in point: "An ministrator shall have action of trespass for tres done to the goods of the testator after his death be the administration granted to him; for the relation settle the possession *ab initio*, so that he may have action." (*b*) And he cites 36 *H.* 6. 8., adding, "*D tatur*, 18 *H.* 6. 22. b.," which is the case already ferred to. The case in 36 *H.* 6. 8. (*c*) fully supp the position in *Rolle*. It is as follows: — "Wri *trespass* was brought by an administrator (*d*) again man, who pleaded in bar, that the testator was sessed of the same goods as of his own goods, and m one *J. C.* and *J. S.* his executors, and died: after wh death the goods came into the hands of the plaint and afterwards the defendant, by commandment of said *J. C.* and *J. S.* executors &c., and as their serv took the goods, &c. out of the possession of the plain and afterwards the said *J. C.* and *J. S.* refused the ministration before the ordinary, and afterwards the o nary committed the administration of all the good the said deceased to the said plaintiff:" concluding w a verification. The counsel for the plaintiff (*e*) took se ral exceptions to the plea: one, that it did not give colo — as not confessing that the plaintiff was ever in poss sion. The different objections were argued at leng and *Prisot* (*g*) said he thought the plea was good, s

(*a*) *Vide post.* 777 *a.*
(*b*) *Vin. Abr.* same title.
(*c*) *Anno* 36 *H.* 6. fo. 7. pl. 4. *Vide post,* 773 (*a*).
(*d*) *Cum testamento annexo ut semble.*
(*e*) *Wangford* Serjt.
(*g*) *C. J.* of *C. P.*

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observed, "As to that which is said that the defendant has not given to the plaintiff any colour, yes, sir, he has confessed in him a possession; and although he had not alleged such possession in the plaintiff, yet it is good colour enough; for it is a matter *in law*, whether an administrator shall have a writ of *trespass for goods carried away* before administration to him committed and after the death of the testator, or not: then when it is a matter in *law*, it is better to shew the matter as it is, and to put it in the discretion of the justices, than to plead to the common issue. And, in my opinion, there is no question, but that they shall have action for *goods carried away* before the administration; because it shall be called an administration from the time of the death: and so the colour here is sufficient enough, for he has confessed a possession in the plaintiff." (*a*) It appears that the court ultimately decided the plea to be bad upon other grounds.] That appears to be a strong *dictum*; but it cannot have the weight of a decision. The real point in the case appears to have been whether the defendant had given colour to the plaintiff. [*Cresswell* J. Or whether he had confessed a sufficient right of action in him. The conclusion of the case is, "that makes all the difference." (*b*) Counsel are sometimes satisfied with a hint.] There are different kinds of administrators — a person may be appointed administrator *pendente lite*, or *durante minore ætate*; in such cases would his title relate back to the time of the death of the testator? Or would it do so in the case of administration *de bonis non?*

Upon the point of surprise, he referred to *Edger* v. *Knapp* (*c*) as a stronger case than the present.

(*a*) He adds, "and although that had been omitted, the colour would have been good enough."

(*b*) "*Needham* and *Moile* (JJ. of C. P.), Ceo veut changer le cas," &c.

(*c*) *Suprà*, p. 753.

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TINDAL C. J. There are two points for consideratio in this case; the first of which is of considerable in portance, namely, whether an action of trespass maintainable by an administrator for a seizure of h intestate's goods, made between the death of the i testate, and the grant of the letters of administratio No direct authority has been cited on the part of t defendant to shew that such an action is not maintai able; but reliance has been mainly placed upon a su posed analogy between the position of an administrat and that of the assignees of a bankrupt in respect their right of action against a sheriff: it having be definitively settled, by the cases of *Garland* v. *Carli* and *Balme* v. *Hutton*, that assignees cannot treat t sheriff as a trespasser by relation, for taking the goods the bankrupt before the fiat, although they may mai tain an action of trover against him. But it appears me that the analogy is not so strong as has been co tended. In actions by assignees against the sheriff f taking goods in execution the latter has done a lawful a He was authorized by the writ to take the goods of t bankrupt; and the only question is, whether, at the ti of the seizure, the property in those goods had be divested out of the bankrupt. But here, the defendant he has taken the goods at all, is a wrong-doer *ab init* If the sheriff had a writ against the goods of *A.* and an administrator were to bring an action agai him for taking the goods, not of *A. B.*, but of his i testate, the sheriff in that case would be a wrong-do But in the case of assignees, the goods taken are least the proper subject of the writ; and therefore t sheriff is not a wrong-doer in taking them, thou after the fiat, he is not entitled to retain them agai the assignees. In this case, however, the defendant a wrong-doer any way. Independently of this, there a authorities upon the subject, to which we are bou

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to yield. In the first place, there are those which the industry of my brother *Cresswell* has brought to light. There is the case in the *Year-books*, 36 *H.* 6. fo. 8. where the broad principle is stated, — that an administrator may maintain an action of trespass for taking away the goods of his intestate after his death and before the grant of the letters of administration. And that is precisely the present case. In *Roll. Abr.* tit. *Trespass* (T.), pl. 2., we find that proposition adopted and incorporated. The same position is laid down in *Fitz. Abr.* tit. *Administrators*, pl. 2., upon the authority of an earlier case in the *Year-books*, 18 *H.* 6. fo. 22.; which, however, is not so distinct an authority. (*a*) Then further on we find *Rolle* himself, when Chief Justice in the time of the Commonwealth, laying down the same doctrine in *Long* v. *Hebb*, and still later we find Lord Chief Baron *Comyns* in his *Digest* (*Com. Dig.* tit. *Administration*, B. 10.) treating the same doctrine as settled law. And no one case has been cited in opposition to this continuous current of authorities. (*b*) And if this were not the rule of law, the extraordinary anomaly which I have before adverted to, would follow. By the statute 4 *Ed.* 3. *c.* 7., executors are enabled to bring actions for trespasses to the estate of the testator during his lifetime; and administrators have always been held to be within the equity of this statute. It would be strange

(*a*) With the exception of judgments of *respondeat ouster* orally delivered on pleas in abatement, few decisions in the form of *judgments* are to be found in the *Year-books*. Upon a pleading being objected to, the objection is discussed at the bar and on the bench. If the objector finds the inclination of the court to be against him, he takes or joins issue, or confesses and avoids; if the objection appears to be favourably received, the mal-pleader amends *toties quoties* until, having rendered his pleading unexceptionable, he is in a situation to compel his adversary to take or join issue or to confess and avoid. The ultimate opinion of the court is shewn by the course taken by the party against whom the opinion is perceived to be.

(*b*) See *Murray* v. *East India Company*, 5 *B.* & *Ald.* 204.

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indeed, if an administrator might sue for a trespass committed in the lifetime of his intestate, and for one committed after the grant of the letters of administration, but not for one committed in the intermediate time. I think therefore that, both upon principle and authority, the present action is maintainable.

As to the motion for a new trial on the ground of surprise, the case of *Edger* v. *Knapp*, which has been relied upon, is not in point. The plaintiff in that case having been nonsuited, might have brought a new action; and I thought it would be putting him to an unnecessary expense to compel him to adopt that course. But the present case stands upon the ground of surprise. It does not appear to me that the defendants have made out a case of surprise; and as it seems to be clear that they could not make a good defence to the whole action, inasmuch as some of the goods were not upon the premises at the time of the seizure, I think the rule obtained must, upon this ground also, be discharged.

COLTMAN J. I am of the same opinion. There are various authorities to shew that a man shall not be made a trespasser by relation in respect of an act which was lawful at the time. But the defendants here were clearly trespassers *ab initio*; and the only question is, *who* had the right to sue them for the trespass? When the rule was first moved for, it occurred to me to ask how it was that a successful lessor of the plaintiff in ejectment could maintain trespass for mesne profits antecedent to the day of demise; as he had no right of action at the time the alleged trespass was committed. It appeared to me that in that case the defendant was not made a wrong-doer by relation, but was shewn to have been one at the time the profits accrued. To that question I received no answer, except that ejectment was a peculiar action. But the rule is the same as obtained in the old action of trespass for disseisin, where the disseisee,

upon recovering possession, might maintain an action for the profits accruing in the intervening period. (*a*)

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The point of surprise has been sufficiently answered by my lord. The court would not, on that ground, send down a case for a new trial, unless they were satisfied that the verdict was substantially wrong.

ERSKINE J. I am of the same opinion upon both points. As to the first, we must assume that the defendants have failed to make out their justification; and that they have taken goods to which they had no right. In other words, they have inflicted an injury; and the only question is, who is entitled to compensation for it? Now the right to these goods was clearly vested in the female plaintiff by the letters of administration granted to her. She was therefore beneficially interested in the goods to which the injury has been done; and consequently she and her husband would be entitled to sue in respect of that injury, unless some strong authority could be produced against their right to maintain the action. But all the authorities that have been cited, both by the bench and at the bar, are in favour of the plaintiffs' right of action. The *dictum*, in the judgment pronounced by *Patteson* J. in *Balme* v. *Hutton*, (for it is no more than a dictum, as it was not necessary to the decision of the case,) might, if pressed to the utmost, support the distinction that has been attempted to be raised in this case between the actions of trespass and trover. But I agree that that *dictum* may be explained upon the ground put by my learned brethren. Where an action is brought by assignees for a seizure of the bankrupt's goods before the issuing of the fiat, the principle is, that trespass will not lie; because the sheriff was doing an act which was lawful at the

(*a*) *Vide Butcher* v. *Butcher*, 1 *Mann. & R.* 220, 221. (*c*).

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time, and which is not to be rendered unlawful by relation merely.

With regard to the question of surprise, I also am of opinion that there is no ground for the application. *Edger* v. *Knapp* is not in point; nor indeed was that case put upon the ground of surprise.

CRESSWELL J. I also am of opinion that there is no ground to make this rule absolute in either alternative. The principal question that has been raised is as to the form of action; my brother *Bompas* having contended that *trespass* is not maintainable under the circumstances of this case. But the older authorities that have been cited shew that there is no doubt upon the point. The case in 36 *H.* 6. fo. 8. seems clearly to establish the principle that an administrator may maintain *trespass* for acts done after the death of the intestate, and before administration; and that principle no one, in that case, ventured to dispute: the only dispute being, whether the defendant by his plea had sufficiently confessed a right of action at some time in the plaintiff. That principle is adopted by *Fitzherbert* and *Rolle* in their abridgments, and by the latter high authority when sitting as Chief Justice in *Long* v. *Hebb*; and it is again recognised by Lord Chief Baron *Comyns*. Have any of these authorities ever been overruled? Is there even any *dictum* that an administrator cannot maintain *trespass* under such circumstances? None has been cited. The whole argument on the part of the defendants has rested upon the supposed analogy between the present case and that of an action by the assignees of a bankrupt against a sheriff for taking the goods of the bankrupt under an execution, after a secret act of bankruptcy, but before the issuing of the fiat; in which case it has been held that, although *trover* will lie by the assignees against the sheriff, *trespass* will not. Now the principle

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of that rule is this — the *quality* of an act that has been done cannot be altered by relation; and therefore the seizure by the sheriff cannot be made a trespass if he was not a trespasser originally; but the seizure of the goods and the refusal to deliver them to the assignee, in whom the property has afterwards vested, is a conversion, for which the assignees are entitled to sue. In the *dictum* in *Balme* v. *Hutton*, which has been pressed upon us, it is obvious that the court did not contemplate the question whether *trespass* would lie in such a case as the present. They were drawing the distinction between *trespass* and *trover* as applicable to the circumstances of that particular case. The court say "there is reason for such a rule, for in *trespass*, the damages are unlimited; in *trover*, they are limited to the value of the property." They evidently thought that no wrong had been done by the sheriff in taking the goods; but, that as there had been a conversion by him, he ought to pay the value of the goods. In this case a trespass has clearly been committed by the defendants; they are wrong-doers; and for doing the wrong, they are liable to damages. They are not trespassers by relation, but trespassers *de facto*. Upon principle, therefore, as well as upon the authorities — which remain undisputed, — I think the present action is maintainable. (*a*)

I agree that no case of surprise has been made out.

Rule discharged. (*b*)

(*a*) It has been since held in the Exchequer that an action lies by an administrator for goods sold after the death of the intestate and before administration granted; *Foster* v. *Bates*, 12 *M.* & *W.* 226.

(*b*) In *M.* 11 *H.* 4. fo. 12. pl. 26. "An apprentice came into C. P. to *Thirning* C. J. and *Hankford* J., and brought with him the copy of an indictment, in which was contained that *A.* smote *B.* on the head with a stick, so that his life was despaired of; that *A.* was arrested by two constables, who had him in their ward; and afterwards the constables, of their own will and assent, suffered *A.* to escape; and afterwards *B.*, who was smitten, died, and *A.* was indicted be-

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fore the coroner, of the death. And upon this the apprentice asked the justices if the constables should be put to answer to that indictment as felons, and if their act should be adjudged to be felony or not. *Thirning.* When they suffered him to escape, *B.*, who was smitten, was alive, and during his life no felony was done. Then having regard to this cause, the constables did no felony, inasmuch as *A.* did no felony until the other was dead. *Apprentice.* Sir, when a man is smitten and afterwards is dead, the felony shall have relation to the time when he was smitten; for the preceding blow causes the subsequent death *Hankford.* He was arrested by authority of the law; and whe he was in their ward they ha no power to let him go; bu they should have considere and weighed the peril whic might happen. *Thirning.* A least they are worthy to mak fine to the value of their good And then the apprentice aske for a full solution of the ques tion. *Thirning.* We will ad vise ourselves."

May 8.

FREDERICK WILLIAM FISHER *v.* MAGNAY and Another.

In trespass by *A. B.*, the defendant justifies under a *ca. sa.* alleged to have been issued against "the now plaintiff," without otherwise describing him. This justification is established by the production of a *ca. sa.* against *C. B.* and proof, that in the former action the now plaintiff was the party sued by the name of *C. B.*

Semble, that the plea would have been more formal if it had alleged that the *ca. sa.* was against *C. B.*, and that the party against whom the *ca. sa.* issued, and the now plaintiff, were one and the same person.

And although it had been alleged that the *ca. sa.* was against *C. B.*, the averment of identity would have been sufficient without averring, that the plaintiff was known as well by one name as by the other.

TRESPASS for false imprisonment. Pleas: first, not guilty; secondly, a justification under a writ of *ca sa.* against *the now plaintiff* at the suit of *James Thoms.*

Replication: that *Thoms* did not sue out the said writ against *the now plaintiff*, modo et formâ.

At the trial before *Tindal* C. J., in *Middlesex* after last *Trinity* term, the following facts appeared:—

In *May* 1841 a writ of summons, issued by *Thom* against *Frederick Fisher*, was served upon the real debtor *George Thomas Fisher*, who, seeing it addressed t

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Frederick Fisher, handed it over to his son, the now plaintiff, whose name is *Frederick William*. *Thoms* proceeded as if the now plaintiff was the defendant in that action; and, in the course of it, the now plaintiff made an affidavit, which was entitled "*James Thoms* v. *Frederick William Fisher*, sued as *Frederick Fisher*." It was contended, on behalf of the plaintiff, that the issue upon the replication to the second plea must be found for him, inasmuch as the writ produced, commanded the sheriff to take *Frederick* and not the now plaintiff, *Frederick William*; and *Cole* v. *Hindson* (*a*), *Shadgett* v. *Clipson* (*b*), *Scandover* v. *Warne* (*c*), and *Finch* v. *Cocken* (*d*) were cited. A verdict was found for the plaintiff upon both issues, damages, 40*s*., with leave to move to enter a verdict for the defendants upon the second issue.

April 19.

Early in this term *Bompas* Serjeant moved accordingly, relying upon *Crawford* v. *Satchwell* (*e*), and distinguishing the cases cited at nisi prius, as decisions upon arrest, not on final, but on mesne process. A rule nisi having been granted,

Byles Serjeant (with whom was *Corry*) now shewed cause. The question is, whether the affirmative of the issue was proved by the writ given in evidence. There can be now no plea of misnomer in abatement; but the 3 & 4 *W*. 4. *c*. 42. *s*. 11. provides a different remedy, enabling the party sued by a wrong name, — to apply for an amendment of the declaration in which the misnomer occurs. There having been no plea in abatement and no amendment of the declaration, it is admitted on the record in that action, that the then defendant was properly named "*Frederick Fisher*." It is not contended

(*a*) 6 *T*. *R*. 234.
(*b*) 8 *East*, 328.
(*c*) 2 *Campb*. 270.
(*d*) 4 *Tyrwh*. 285., 2 *C*. *M*. & *R*. 196., 3 *Dowl*. *P*. *C*. 678.
(*e*) 2 *Stra*. 1218.

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that the plea in the present action might not have been so framed as to establish a sufficient defence for the sheriff. The point for the sheriff to make out was that the now plaintiff was the defendant in the former action. In that action, the father was the party really sued by *Thoms*. [*Cresswell* J. The now plaintiff has sworn that *he* was the party sued. *Coltman* J. The defendant in an action is the party served with the writ of summons.] Who was the debtor? The father stated that it was he who owed *Thoms* the money. *George Thomas Fisher* was the real debtor. *Crawford* v. *Satchwell*, upon which this rule was obtained, shews that the real debtor who is served with the process, is to be considered as the real defendant, whether properly described in the process or not. No other person can, by any admission on his part, substitute himself as defendant instead of the party who has been served with the process, and who is also the real debtor. If it were otherwise a plaintiff would have an option to proceed against the party originally sued, or against a stranger who had made himself defendant by his admission. [*Tindal* C. J. The statement of the party may give a particular colour to an equivocal act. *Cresswell* J. Suppose the officer served one person, and discovering that he had served the wrong party, afterwards served the right person, the latter service would be effectual. So here, the father hands over the writ to the son, who accepts it as process served upon himself.] *Cole* v. *Hindson* is a much stronger case than the present, because there it was pleaded that the writ under which the goods of the plaintiff *Aquila Cole* were taken, was issued against *Aquila Cole* by the name of *Richard Cole*. Lord *Kenyon* says, "The defendants were not justified in seizing the goods of *Aquila Cole* under a distringas against *Richard Cole;* and the averment in the plea; that *Aquila* and *Richard* are the same person, will not assist them; as

they have not also averred *that the plaintiff was known as well by one name as by the other.*" Here, the plea should have alleged that the plaintiff was known as well by the name of *Frederick Fisher* as by the name of *Frederick William Fisher.* That should have been averred, and, if traversed, proved. [*Cresswell* J. Suppose there was no evidence that the plaintiff had ever been known by the name in which he was sued in the former action. A party sued by a wrong name may plead, and may suffer the proceedings to go on to judgment without taking any notice of the misnomer. Is the plaintiff to lose the fruits of his judgment? *Tindal* C. J. Supposing a man sued by the name of *Thomas* appears, and without pleading in abatement, or taking any other objection to the misnomer, allows the suit to proceed against him by that name, can he not be lawfully taken under a *ca. sa.* against *Thomas*, although that is not his real name?] It is true that he may be lawfully taken; but in justifying that taking it must be shewn that there was a reasonable ground for issuing the *ca. sa.* in the name of *Thomas.* This was so held in *Scandover* v. *Warne*, upon the authority of *Shadgett* v. *Clipson*, to which Lord *Ellenborough* expressly refers. [*Coltman* J. If the defendants in this case had alleged that the now plaintiff was known as well by one name as the other, it would have been only an expansion on the record of the allegation that the *ca. sa.* issued against *the plaintiff.* *Tindal* C. J. By appearing in a name by which the party is sued by mistake, he does not admit that he is known by one name as well as by the other.] *Shadgett* v. *Clipson* shews that there is no difficulty where a party is sued by a wrong name. If he is taken in execution by the wrong name the defendant may justify by allegating that the plaintiff is known by one name as well as by the other; for if he is not so known, the sheriff had no warrant for taking him at all; *Scandover* v. *Warne;*

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Morgans v. *Bridges*. (*a*) Here, the defendant should have averred that the plaintiff was the person sued by *Thoms*, and that he was known as well by the name *Frederick Fisher* as by the name of *Frederick William Fisher*. [*Tindal* C. J. Why is it necessary that he should have been known by a different name, if he has suffered judgment by the wrong name?] It is said that the sheriff seized the person against whom the judgment was obtained; but this ought to appear by the proceedings themselves, and not to be introduced by parol evidence; *Finch* v. *Cocken*.

Bompas Serjt. (with whom was *Kennedy*) in support of the rule. At the trial it was taken as admitted that the now plaintiff was the party against whom the *ca. sa.* issued. Although the plaintiff sues by the name of *Frederick William Fisher*, it must not be assumed that his name is really different from that under which he was taken in execution. A defendant cannot now dispute the name in which the plaintiff chooses to sue. [*Coltman* J. May he not call upon the plaintiff to alter the name in his declaration?] The court of Exchequer, in *Moody* v. *Aslatt* (*b*), refused to allow such an alteration to be made, considering it to be unnecessary. In general, the defendant cannot know whether the name in which the plaintiff chooses to sue, is his *real* name or not. Here, however, the plaintiff has admitted conclusively that his name is *Frederick Fisher*. The plea in *Crawford* v. *Satchwell* contains no allegation that the party was known as well by one name as by the other. In this case, the plea states that "the plaintiff" was the party against whom the *ca. sa.* issued; which is equivalent to saying, that the former defendant and the

(*a*) 1 *B. & Ald.* 647.
(*b*) 5 *Tyrwh.* 492., 1 *C. M. & R.* 771.

present plaintiff are one and the same person. The plea does not profess to set out the form of the *ca. sa.* In all the cases in which it was considered necessary to allege that the party was known as well by one name as the other, the question arose upon mesne process. Here, the process under which the plaintiff was taken, was a writ of execution, which necessarily pursued the judgment. But if, instead of suffering judgment by default, the defendant in the former action had put in issue the debt sued for in that action by *Thomas*, evidence of liability on the part of *Frederick William Fisher*, with proof that *Frederick William Fisher* was the party acting as defendant in the action, would have been sufficient to support the issue.

TINDAL C. J. In this case an action has been brought against the sheriff of *Middlesex* in the name of *Frederick William Fisher*, for assault and false imprisonment; and the sheriff has justified under a *ca. sa.* directed to him. The mode in which the issuing of the writ is stated is this: "That one *James Thoms* sued and prosecuted out of the court, &c. a certain writ, called a *capias ad satisfaciendum, against the plaintiff*, directed to the sheriff of *Middlesex*, by which writ the sheriff was commanded that he should *take the plaintiff*, if he should be found in his bailiwick, and should safely keep him, so that he might have the plaintiff's body before &c. immediately after the execution of the writ, to satisfy the said *J. T.* a certain debt of, &c." The real objection upon the production of the writ, appears to be that it is a writ issued against one *Frederick Fisher*, and not against *Frederick William Fisher*, it being objected that the writ does not make out the allegation that the *ca. sa.* issued *against the plaintiff*. I agree that if this were a *capias ad respondendum*, the objection would apply, and that it would be necessary to shew that the

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plaintiff was known as well by one name as by the other. This is not a process to bring the party into court, where he has the power of compelling the plaintiff to set the name right, if he is served by a wrong name. But the plaintiff has suffered judgment to go against him in the wrong name, and the sheriff in effect says, "You were taken under a *ca. sa.* which issued against *you.*" I cannot distinguish this case from that of *Crawford* v. *Satchwell.* There, the plea pointed out that the person then plaintiff, was the same person who had been sued and taken in execution by another name. Here, the same thing is done in a less circuitous way. If the plaintiff was dissatisfied with the general mode of pleading he might, perhaps, have compelled the defendant to set out the precise terms of the case in his plea. In 1 *Wms. Saund.* 297. *n.* (1.) it is said, that "in trespass, when the defendant justifies under a writ, warrant, precept, or any other authority whatever, he must set forth particularly in his plea; for it is not sufficient to allege *generally* (*a*), that he committed the act complained of by virtue of a certain writ or other warrant directed to him; but he must set it forth specially; *Co. Litt.* 283. *a.*; 3 *Mod.* 137, *Mathews* v. *Cary*, 138. *Matthews* v. *Carew*; *S. C.* 1 *Salk.* 107, 108.; 4 *Mod.* 378. *Lamb* v. *Mills*; *Com. Dig. Pleader* (E. 17.); and the defendant ought further to aver in his plea, that he has substantially pursued such authority; *Co. Litt.* 303. *b.*" Suppose that here, the plaintiff had objected to the generality of the language of the plea, and the defendant had been compelled to alter his plea by stating that the *ca. sa.* issued against *Frederick Fisher*, he would have alleged that *Frederick Fisher* and the now

(*a*) The *generality* objected to by Serjt. *Williams* appears to have been of a much more vague character than that which could be objected to in the plea in the principal case. *Vide post*, p. 786 (*a*).

plaintiff were one and the same person. The plea would then have been in the same form as in *Crawford* v. *Satchwell*, and the evidence would have supported the plea.

COLTMAN J. I am of the same opinion. It appears from *Crawford* v. *Satchwell*, that the writ of execution must follow the judgment, and must issue against the party in the same name in which judgment was recovered against him, but that in justifying under such a writ, it is not necessary to aver that the party is known by one name as well as by the other. It would be very odd if that were necessary. A plaintiff who had recovered judgment against a party sued by a wrong name, would be in a strange position if he could not safely issue execution against him by that name, though he may never have been known by that name up to the day on which he was sued. Here, the point arises upon the question, whether there is or is not a variance. The allegation — that the writ issued against the plaintiff, — appears to me to be satisfied by shewing that the plaintiff was the party against whom that writ really issued. It is a compendious mode of stating that which in *Crawford* v. *Satchwell* is expanded on the record.

ERSKINE J. The fallacy of the argument on the part of the plaintiff, appears to me to be this: — that two different points which arise in a defence of this sort, are not kept distinct. The first point is, whether the writ was wrongly sued out; the second is, whether there is a variance between the allegation in the plea, and the writ produced to support that allegation. Upon the first point it appears to me that the writ could not have been sued out in any other name than that in which the judgment was recovered, whatever the real name of the party may have been. There can therefore be no

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objection to the form of the writ. In the cases cited, the question has been, not whether the person taken was the person sued, but whether the writ was a proper writ. Where mesne process issues against a party by a wrong name, the writ itself is bad, and cannot be cured by shewing that the party is the same, without going on to aver that he is known as well by one name as by the other. But here, the whole question arises upon the point of variance. It is alleged in the plea that the writ issued against the plaintiff; then who is the plaintiff? Whether the person named in the writ and the person who brings this action, are one and the same person, is a question of evidence; and here, it clearly appears that they are. The question whether it is sufficient to frame a plea in this general form is not now before the court. The objection might have been taken by special demurrer (*a*), and then the defendant could have amended his plea by adopting the form pursued in *Crawford* v. *Satchwell*.

(*a*) Before demurring to such a plea, a plaintiff would do well to consider, whether as the court has decided in the principal case—agreeably to the determination in *Crawford* v. *Satchwell*—that it is immaterial in what name the *ca. sa.* issued against the party who complains of the imprisonment, the non-disclosure of that immaterial fact is any ground of objection to the plea; it being sufficient to plead an instrument according to its legal effect without pursuing its terms. *Vide antè*, Vol. III. 780.

The very passage in *Co. Litt.* referred to by *Williams* Serjt., *suprà*, p. 784., is simply this. "Here, it is to be observed that the law of *England* respecteth the effect and substance of the matter, and not every nicety of form and circumstance. *Qui hæret in literâ, hæret in cortice; et apices juris non sunt jura.*" As to the three other references — in *Mathews* v. *Carey* the defendant justified under a *mandate* from the dean and chapter; whereas he ought to have shewn a *warrant* from their steward; — in *Lamb* v. *Mills* the objection was, that the plea alleged that the defendant took the plaintiff's goods as bailiff, without shewing any process authorising him to take them — and *Com. Dig. Pleader* (E 17.) contains merely a reference to *Co. Litt.*, and an abstract of the case of *Mathews* v. *Carey*, 3 & 4 *Mod.*

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CRESSWELL J. I am of the same opinion. The distinction is between mesne and final process. Upon the former the defendant has a right to insist upon being sued by his real name. But, if, when sued in a different name, he omits to take his objection in the mode pointed out by law, he acquiesces in being sued by that name, and cannot afterwards retract his admission. In *William Price* v. *Harwood* (*a*), *W. P.* being asked whether his name was not *John Price*, answered that it was; upon which process issued against him by the latter name, and his goods were taken to compel an appearance. It was held (*b*) that trespass was not maintainable against the officer; and Lord *Ellenborough* seems to have considered in that case, that the statement made by the party was *conclusive* upon him. (*c*) So here, the plaintiff is bound by his admission. Then the question is this, — did the *ca. sa.* issue against the plaintiff? The case in *Strange* is an authority for the position that it is not necessary that the name should be the same; and the sheriff has not undertaken to shew that the writ, under which he justifies, issued against the plaintiff by the name of *Frederick William Fisher*.

Rule absolute. (*d*)

(*a*) 3 *Campb.* 108.

(*b*) Under a plea of not guilty, given by a local act.

(*c*) That was a nisi prius case. But in *Coote* v. *Lighworth*, Sir *Fra. Moore*, 457., "*Coote* brought false imprisonment against *Lighworth*, who justified because he had a warrant to arrest *J. D.*, and he asked of *Coote* what his name was; and that he answered that his name was *J. D.* and that thereupon he arrested him. The plaintiff demurred. And it was adjudged for the plaintiff, because the defendant ought, at his peril, to take notice of the party." And in the case of *Thurbane, et al., Hardres*, 323. *Hale* C. B. said *obiter*, "If a wrong man be taken, though he affirm himself to be the person against whom the commission (of rebellion) is awarded, yet the commissioners, having no warrant to take him by their commission, his affirming himself to be the person, will not excuse them in false imprisonment; as has been held upon the executing of a *capias*."

(*d*) "*Scire facias* brought by *John Legg* and *M.* his wife

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upon a judgment on a writ of dower against three several tenants, two made default, and the third came and said that he was tenant of the entirety, and said, that in the record he (*i. e.* the plaintiff) is named *John Begge*, and in the writ *John Legge*, and prays judgment of the writ. And because it was not said that he was *another person*, the writ was awarded good." *M.* 27 *E.* 3. fo. 12. pl. 48.

"*A.* brings an action in C. P. against *Julian Goddard*, a *feme sole*. The parties are at issue, and a *venire facias* is awarded, and before the return of it, the feme takes to baron one *Doiley*, and after, upon special verdict found in the said suit, judgment was given in bank *pro prædictâ Julianâ* against *A.*; upon which judgment *A.* brings writ of error in *B. R.*, and a *scire facias* is awarded against *Julian Goddard* as a feme sole, and she appears by attorney as a feme sole, by the assent of her baron; and after the judgment is reversed; and the judgment is entered *quod prædictus A. recuperet &c. versus prædictam Julianam &c.*, and costs and damages taxed &c., upon which judgment *A.* sues a *capias ad satisfaciendum* against *Julian Goddard*, by force of which writ the sheriff takes the said *Julian*, who is called *Doiley*, she being the wife of *Doiley*; yet it is lawful; for the feme, so long as the judgment is of effect, is estopped to say that her name is other than *Julian Goddard*; *and the sheriff, being the minister to execute the judgment, may take advantage of this estoppel.*" 1 *Roll. Abr.* 869, 870. In the case the matter was fully dis closed by the plea. *S. C. Cr Jac.* 323.; *Rock* v. *Leighto* 1 *Salk.* 310., 4th point.

Where a party enters into bond by a wrong name he can not be sued thereon by h right name; *Gould* v. *Barne* 3 *Taunt.* 504.; and therefo where it appeared by a speci verdict, that a bond purporte that Sir *John Clarke*, knt., b came bound to *Thomas Ma ning*, Esq. although the co dition was for the repayment a sum of money by the *abo bounden* Sir *Robert Clarke*, kn a judgment for the plaintiff C. B., in an action brought the executor of *Manning* again Sir *Robert Clarke*, was rever in K. B. *Clarke* v. *Isted*, *Lutw.* 894.

Where a party who has e tered into a bond by a wro name, is sued by that name, it said that if he plead misnom in abatement, the plaintiff m reply the estoppel, but that he does not appear, and is ou lawed, the outlawry, being in wrong name, will be erroneou *Dyer*, 279 *b.* in marg. And s *Gordon* v. *Austin*, 4 *T. R.* 61

And see further as to misnom in process, *Hedd and Chalone* case, 1 *Leon.* 146., *Cro. Eli* 176., 2 *Roll. Abr.* 42.; *Cle of Trustees of Taunton Mark* v. *Kimberley*, 2 *W. Bla.* 1120 *Gardner* v. *Walker*, 3 *Ans* 935.; *Wilks* v. *Lorck*, 2 *Tau* 399.; *Smith* v. *Patten*, 6 *Tau* 115., 1 *Marsh.* 474.; *Bow* v. *Atkins*, 2 *Chitt.* 56.; *Ne ton* v. *Maxwell*, 2 *Tyrwh.* 27 2 *C. & J.* 215., 1 *Dowl. P.* 315.; *Hinton* v. *Stebens*, 1 *Ha & W.* 521.; *Walker* v. *Willough*

6 *Taunt.* 530., 2 *Marsh.* 230.; *Boughton* v. *Frere*, 3 *Campb.* 29.; *Morley* v. *Law*, 2 *Bro.* & *B.* 34., 4 *J. B. Moore*, 309.; *Lindsay* v. *Wells*, 3 *New Cases*, 777., 4 *Scott*, 471., 8 *Hodges*, 97., 5 *Dowl. P. C.* 618.; *Rust* v. *Kennedy*, 4 *M.* & *W.* 586., 7 *Dowl. P. C.* 199.; *Borthwick* v. *Ravenscroft*, 5 *M.* & *W.* 31., 7 *Dowl. P. C.* 393.; *Kitchen* v. *Brooke*, 5 *M.* & *W.* 522., 8 *Dowl. P. C.* 232.; *Wilde* v. *Keep*, 6 *Carr.* & *P.* 235.

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HILL, Clerk, *v.* RAMM.

DEBT, for use and occupation.

Plea: *nunquam indebitatus.*

By the particulars of demand, the plaintiff claimed 11*l.* for a quarter's rent of a house.

At the trial before *Coltman* J. at the *London* sittings in *Trinity* term, 1842, the following facts appeared.

On the 28th of *December* 1840, the plaintiff distrained upon the house for 38*l.* 10*s.* alleged to be owing from the defendant to the plaintiff in respect of a year's rent due at *Christmas*. In order to prove that the defendant was the tenant of the premises, in which the defendant carried on his trade, though his mother occupied the house, it was proposed, on the part of the plaintiff, to shew that on the 29th the distress was withdrawn upon the defendant's signing the following memorandum, addressed to the plaintiff. "In consequence of your withdrawing, at my request, the distress upon the premises I hold of you, situate at No. 17, *Clement's Lane*, in the parish of *St. Clement's Danes*, in the county of *Middlesex*, *as tenant thereof*, for one year's rent due *Christmas* day last, at the rate of 44*l.* per annum (less 5*l.* 10*s.* allowed to me), and giving time for the payment of the said rent, *which I*

A memorandum, by which, in consideration that *A.* will withdraw a distress for a sum exceeding 20*l.*, which *B.* admits to be due from him as tenant to *A.*, until a future day, *B.* declares, that in case of default it shall be lawful for *A.* to enter and distrain, and to pursue all remedies for the recovery of the rent, as if no distress had been taken, is admissible in evidence to prove the tenancy without an agreement stamp. (*a*)

(*a*) *Vide post*, 792 (*b*); 793 (*b*); *Cox* v. *Bailey*, T. T. 1843, *post*, Vol. VI. p. 193.

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hereby acknowledge to be due unto you as the landlord c the said premises, until the 1st day of *February* next, hereby authorise you, on default being made by me i such payment at the time aforesaid, to re-enter upo the said premises, and there distrain for the said sum 38*l.* 10*s.*, or any lesser sum thereof, then in arrear an unpaid, notwithstanding the withdrawal of the distre now made by you in respect of the said sum of 38*l.* 10 And I hereby declare that your now withdrawing th present distress shall in no way prevent you from agai distraining upon the said premises. And I hereb empower you to use and pursue all such powers an remedies for the recovery of the said rent as to you ma seem advisable; and the distress now withdrawn, o any matter or thing done in consequence thereof, sha not be taken in bar thereof, or be pleaded in satisfac tion or discharge thereto, nor shall you be deemed trespasser or wrong doer in respect of such re-entry o second distress. Dated, the 29th of *December* 1840. It was objected by the defendant's counsel that thi memorandum could not be received in evidence fo want of a stamp. It was answered that a stamp wa unnecessary, as the subject-matter of the memorandu was not of a value amounting to 20*l.*, and that it re served to the plaintiff nothing but what he would b otherwise entitled to by law. The learned judge ad mitted the document; and a verdict was taken for the quarter's rent.

Channell Serjt., in *Hilary* term last, moved for a new trial, on the ground that the memorandum had been improperly admitted.

A rule nisi having been granted,

Bompas Serjt. now shewed cause. The document in question was offered in evidence, not as proof of an

agreement, but as shewing that the defendant had admitted that he was the tenant of the house. In *Hill* v. *Johnson* (*a*) it was contended by the defendant, the drawer of a bill, that time had been given to the acceptor. The plaintiff produced a paper which the defendant had promised to sign, whereby the defendant consented to the plaintiff's using any means to obtain payment from the acceptor, without prejudice to his rights against the defendant as drawer. It was held that this paper did not require a stamp. Here, the memorandum contains no words of agreement, but merely a licence to re-enter in consideration of the plaintiff's withdrawing his distress. [*Cresswell* J. Does such a licence require any consideration?] It does not; for the plaintiff, without any licence, would be entitled to distrain again. [*Tindal* C. J. This is an admission that the defendant was tenant. *Erskine* J. The *purpose* for which the defendant admitted himself to be the plaintiffs' tenant, will not affect the admissibility of the document.] It amounts to no more than this, "If you will withdraw the distress, it shall be without prejudice." In *Forsyth* v. *Jervis* (*b*) it was held, that part of an unstamped letter might be read for a collateral purpose, although the chief part of the letter related to an order for the making of a gun. So here, the plaintiff required that part only to be read, in which the defendant acknowledged that he was *tenant* to the plaintiff. In *Parker* v. *Dubois* (*c*), a letter from *A.* in which he requested *B.* to pay a call upon some mining shares for him, was held to be admissible in evidence, to shew that *A.* was a shareholder, although a contract was inferred from that admission; which goes far beyond the present case.

(*a*) 3 *Carr. & P.* 456.
(*b*) 1 *Stark. N. P. C.* 437.
(*c*) 1 *M. & W.* 30., *Tyrwh. & G.* 243., 1 *Gale, Exch.* 366.

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Channell Serjt. (with whom was *Pigott*), in support o the rule. A mere acknowledgment would require n stamp. Neither would an agreement, which gave r right which the parties did not possess before. B this is an agreement conferring new rights; and it, ther fore, requires a stamp. [*Tindal* C. J. If it is an agre ment, is it any thing more than an agreement on t part of the tenant to allow the landlord to avail hims of his legal rights? How can we know, whether t subject-matter of such an agreement is of the val of 20*l.*?] In *Mallett* v. *Hutchinson* (*a*) the first pa of the paper which was received in evidence, w merely an acknowledgment; and the remainder, thoug called an agreement, contained nothing but what t law would have implied. Here, it must be taken th but for the agreement, the landlord would have had r right to re-enter. [*Tindal* C. J. Do you say that a action of trespass, or an action for a vexatious distres would have lain?] It is not material whether the t nant's action would have been an action of trespas or whether his remedy would have been by an actio for a vexatious distress would have lain, if the landlo had entered without some such arrangement as is co tained in this memorandum. Here, the landlord takes, b the consent of the tenant, the power of doing that whic without such consent he could not lawfully have don He purchases an indemnity against either an action o trespass, or an action on the case. [*Coltman* J. Do not a contract arise out of the independent fact of th withdrawing of the distress at the request of the defen ant? (*b*)] It is submitted that it does.

(*a*) 7 *B. & C.* 639., 1 *Mann. & Ryl.* 522.

(*b*) By the memorandum the plaintiff agrees to give time for the payment of the rent until the 1st of *February*. N consideration for this forbea ance appears on the face of th instrument, if the plaintiff a quired no new right under i

If the memorandum gives the plaintiff larger powers than he would have had without it, it is incumbent on the defendant to shew that the subject matter of the agreement is below 20*l.* *Sheppard* v. *Wheble.* (*a*)

TINDAL C. J. I am of opinion that the memorandum in question does not amount to a contract, but is merely a licence or authority to enter. There is nothing which the party contracts to do or to pay. It is therefore not an agreement, within the *55 G.* 3. *c.* 184. Sched. Part I.

But supposing it to be an agreement, it by no means appears to be an agreement, the matter whereof amounts to 20*l.*; and Lord *Tenterden* has held that it lies on the party who take the objection that the instrument is not stamped, to shew that there is a subject matter of the agreement amounting to 20*l.*, it being a condition in the enacting part of the schedule itself, and not a qualification brought in by way of exception or proviso, or appearing in the form of an exemption. And, assuming this to be an agreement, neither the amount of rent nor the value of the goods distrained is the subject matter of the agreement, but the indemnity against an action for a second entry; the value of which indemnity may be very small. (*b*) This case comes within the principle of the cases of contracts to carry goods, in which the value of the safe carriage, and not the value of the goods, is

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The security given for the rent would however be a sufficient consideration for such forbearance; and, though *dehors* the instrument, it would be available to support the promise to forbear.

In this view of the case the instrument would appear to require an agreement stamp, supposing "the matter thereof to be of the value of 20*l.* or upwards." *Vide infrà,* note (*b*).

(*a*) 8 *Carr. & P.* 534.

(*b*) *Quære,* whether in a contract to give time for the payment of 38*l.* 10*s.*, "the matter of the agreement" may not be said to be the sum agreed to be forborne.

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considered to be the subject matter of the contract: *Latham* v. *Rutley*. (*a*)

COLTMAN J. The only thing which the memorandum professes to give to the plaintiff, is, a power to re-enter upon non-payment of the rent on the 1st of *February*, in consideration of his withdrawing from possession; a power which he was by law entitled to exercise, without any consent on the part of the defendant. (*b*)

ERSKINE J. I am also of opinion that this rule must be discharged. The memorandum appears to amount to nothing more than a licence to re-enter and to take a distress, the immediate enforcement of the right of distress being relinquished by the landlord at the request of the tenant. Though a contract might be raised upon this memorandum, namely, an undertaking on the part of the tenant not to bring an action of trespass for the re-entry, the same objection might be raised in every case of leave and licence; as it might be said that the leave and licence amounted to an agreement, on the part of the licensor, not to sue the licensee.

CRESSWELL J. concurred.

Rule discharged. (*c*)

(*a*) *Ryan & Moo.* 13.

(*b*) As to the compromise of an unfounded claim, or the acquiescence in a contested right, being a sufficient consideration for an express promise, see *Longridge* v. *Dorville*, 5 *B. & Ald.* 117.; 2 *Roll. Abr.* 23. pl. 28., 1 *Vin. Abr.* 209. pl. 28.; *Penn* v. *Lord Baltimore*, 1 *Ves.* sen. 444. 450.; *Griffith* v. *Sheffield*, 1 *Eden*, 73. 76.; *Lofts* v. *Hudson*, 2 *Mann. & R.* 481.; *Wilkinson* v. *Byers*, 1 *A. & E.* 106., 3 *N. & M.* 853.; *Home* v. *Booth*, *antè*, Vol. III. p. 709.; 2 *Wms. Saund.* 137. *e.* note (*b*).

(*c*) And see *Doe* v. *Avis*, at Nisi Prius, *Chitt. Stat.* 964. In that case Lord *Tenterden* C. J. said, "The words of the act are so ambiguous that the party objecting ought to make out the affirmative."

As to the admissibility of an unstamped document in evidence for collateral purposes, *vide supra*, 791.; *Hawkins* v. *Warre*, 3 *B. & C.* 690.; 5 *D. & R.* 512.

Doe dem. SIMPSON *v.* HALL.

April 24.

EJECTMENT.

At the trial before *Parke* B. at the last assizes for the county of *York*, the first question which arose was, whether a tenancy which had subsisted between the lessor of the plaintiff and the defendant, had been determined.

A notice was prepared by one *Burland*, purporting that he, *Burland*, as attorney for *Simpson*, required the defendant to quit on the 6th of *April* 1842. A duplicate of this notice was delivered to a party to be served, but the service itself could not be proved. It was however shewn that on the 28th of *March* the defendant called on the landlord's attorney, and spoke to him respecting the notice; and that the defendant applied to a valuer to value his rights as outgoing tenant. It was objected that this evidence was insufficient to entitle the plaintiff to have the duplicate kept by the attorney read.

The objection was overruled, and the duplicate notice was read in evidence.

Parke B. having pointed out to the counsel that the demise was laid on the 30th of *May* in the *sixth* year of Queen *Victoria*, a day which had not arrived, it was contended on the part of the defendant, that the plaintiff ought to be nonsuited. (*a*) The learned judge re-

Held, that it is competent to a judge at nisi prius to amend the declaration &c. in ejectment by altering the date of the demise which was subsequent to that on which the right of entry accrued, but was a day which had not arrived when the action was brought, and when it was tried, to an *earlier* date without any thing to amend by beyond the necessity of the amendment to the maintenance of the plaintiff's right of action.

The regular service of a notice to quit was held to have been properly inferred from the circumstance of the tenant's speaking about "the notice to quit which he had received," and engaging a valuer to value his rights as an outgoing tenant.

(*a*) By the consent rule, the defendant is required and undertakes to confess the "lease" *i. e.* the demise of the tenements mentioned in the declaration, *and to insist upon title only.* By the latter part of the rule must, it is conceived, be understood absence of proof of title in the lessor of the plaintiff; the de-

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fused to direct a nonsuit to be entered, and ordered tl declaration, issue, and record to be amended by inse ing the word "fifth" instead of "sixth;" and a verdi was returned for the plaintiff.

Channell Serjt. moved for a new trial on the grou that the learned judge had no power to make t amendment, and that there was no sufficient evidence a valid notice to quit.

In *Doe d. Edwards* v. *Leach* (*a*), which will perha be relied on as a case in which an amendment w allowed to be made in the day of the demise, there w something to amend by; as the lease, giving the rig of re-entry, was produced. (*b*) Here, there was nothi

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fendant not being bound to set up any title either in himself or in a third person, until the plaintiff has made out a *primâ facie* title in his lessor, such as, if unanswered, would shew a right of possession in the lessor of the plaintiff at the time of the making of the demise. The penalty *expressed* in the rule attaches only where the defendant refuses to make *the confession*. Here, he confesses the demise, &c. as laid, but, without raising any question of title, he denies the existence of a right of action; he therefore does not *insist upon title only*; but, admitting the *title* to be in the lessor of the plaintiff, the defendant contends that a demise declared upon as already made, and therefore, in effect, alleged to have been made before action brought, though without a date, or, what is the same thing, with an impossible date, is not, with the also confessed entry and ouster, sufficient to support the action.

Quære, whether an atta ment would lie against a par who, having confessed le entry and ouster, raised, a succeeded upon, an object unconnected with any matter title, in contravention of his u dertaking to insist upon title on

(*a*) *Antè*, Vol. III. 22(3 *Scott, N. R.* 509.; 9 *Do P. C.* 877.

(*b*) The statute (3 & 4 *W* c. 42.) *s.* 23. after reciting "t great expense is often incurr and delay or failure of just takes place at trials, by rea of variances, as to some p ticular or particulars betw the proof and the record, setting forth on the record document on which the trial had, of contracts, customs, p scriptions, names, and otl matters or circumstances, r material to the merits of t case, and by the misstatement which the opposite party ca not have been prejudiced, a the same cannot, in any ca be amended at the trial, exc

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to amend by. To give the power to amend, there should be some variance apparent upon the production of the evidence. [*Tindal* C. J. Supposing no amendment to have been made, could the absence of a date to the demise have been a ground of nonsuit?] The defendant asks only for a new trial. To this he is entitled if the judge had no power to make the amendment. In a case before *Coltman* J., that learned judge refused to order a similar amendment, saying, that either he had no power to amend, or, if he had, it was not a case in which an amendment ought to be allowed. (To this statement that learned judge assented.)

But supposing this to be a case in which an amendment could be properly made, there was no evidence to support the declaration. [*Coltman* J. The right of entry had accrued at the expiration of the notice.]

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when the variance is between any matter in writing or in print produced in evidence and the record,—enacts, that it shall be lawful for any court of record holding plea in civil actions, and any judge sitting at *nisi prius*, if such court or judge shall see fit so to do, to cause the record, writ, or document, on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a *quo warranto*, or proceedceedings on a *mandamus*, when any variance shall appear between the proof and the recital, or setting forth, on the record, writ or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars, — in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, — to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms, &c.

In *Doe dem. Edwards* v. *Leach* the *provision* for re-entry, —the *potential* right of the landlord to re-enter, — appeared upon the face of the lease; but the *actual* right of re-entry was the result of the clause of re-entry in the lease, coupled with the act or default done or committed by the tenant. See *Jones* v. *Pope*, 1 *Saund.* 37, 38. It appears to be immaterial, with reference to the power of amendment, whether the right of re-entry accrues from an act done or default made, in contravention of a written contract, or from any other act or default.

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TINDAL C. J., on a subsequent day, said, it appear from Mr. Baron *Parke's* notes, that the duplicate notic to quit, which was read in evidence, contained th proper day for the determination of the demise, an that after the period at which the notice was suppose to have been delivered, the defendant acknowledged t the agent of the landlord, that he had received notic to quit. The instrument, therefore, was properly ad mitted in evidence; and we think that it gave sufficier notice to the defendant to determine the tenancy. Co sequently there is no ground for granting a new trial, upon a verdict against evidence.

With respect to the question of amendment, we thin that the amendment was properly made. It was stronger measure in *Doe dem. Edwards* v. *Leach* amend the declaration by inserting one possible day i stead of another which was equally possible, than her to substitute a possible for an impossible day.

Rule refuse

MEMORANDA.

Nathaniel Richard Clarke, of the *Middle Temple*, Esq and afterwards *John Barnard Byles*, of the *Inner Temp* Esq., having received writs, issued in *Hilary* vacatio pursuant to 6 *G.* 4. *c.* 95., commanding them to tal upon themselves the state and dignity of a Serjeant-a law, severally appeared before the Lord Chancellor *Lincoln's Inn*, and taking the oaths usually administere to persons called to that degree and office, becam Serjeants-at-law sworn, agreeably to the provisions of th act. The former gave rings, with the motto, "*Sapie qui assiduus;*" the latter, with the motto, "*Metuit secu dis.*"— In the same vacation Mr. Serjt. *Wrangham* r ceived a patent of precedence to rank after *Loftus Wigram*, Esq., Q. C.

AN

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1. The jurat of a joint affidavit must shew that each of the deponents was severally sworn. *Pardoe* v. *Territt.* Page 291
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(a) The registration appeal cases will be found in a separate index, *post.*

day fixed, but which was resworn after that day, for the purpose of rectifying a mistake in the jurat. *Ouchterlony* v. *Gibson.* Page 579

3. A rule having been discharged, the court refused to re-open it upon a suggestion, supported by affidavit, that the affidavit on which the rule had been discharged was false. *Bichley* v. *Fell.* 695

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A memorandum as follows: "Send me a licence to use two of *A.*'s patent furnaces to be applied to a singe-plate, &c., for which I agree to pay, as agreed, 25*l.* as a patent right, and which is to include iron works, fire-bricks, and labour; engineers or furnace builders' time to superintend or fix the above order, to be paid 6*s.* per day."

Held, to be either an agreement or an acceptance of a previous proposal, and therefore to require a stamp.

Held also, that it was not within the exemption in the stamp act, as relating to "the sale of goods, wares, or merchandize," as either the primary object of t agreement was the licence, or was an agreement for the ert tion of fixtures. *Chanter* v. *Di inson.* Page 2

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In assumpsit by a corporation, the declaration stated, that the defendants had presented a petition for leave to bring in a bill for draining certain slob or waste lands in *Ireland*, the introduction of which bill was opposed by the plaintiffs and also by *A.*; and that by a certain agreement made "between *B.* on behalf of the plaintiffs, of the first part, *C.* on behalf of *A.* of the second part, and the defendants, of the third part, it was agreed that the plaintiffs and *A.* should withdraw all opposition to the bill; that the clauses therein should be settled by the solicitors of the parties, in order that the bill might be as perfect and beneficial as it could be made; that the plaintiffs and *A.* should use all reasonable means and endeavours to promote the progress of the bill; that certain part of the slob should be allotted to the plaintiffs, and certain other part to *A.*; that the defendants should, on the passing of the act, pay the plaintiffs 1000*l.*; and that the defendants should pay all costs of obtaining the act; that by a memorandum indorsed upon the agreement, with the consent of all parties, and signed by *D.*, as agent to the defendants, it was declared that the plaintiffs and *A.* were severally and jointly bound; that the 1000*l.* was to be paid to the plaintiffs for expenses incurred by them in a survey, and for plans, &c., of which the defendants were to have the benefit; but that the plans, &c. were to be returned to the plaintiffs if the 1000*l.* were not paid. The declaration then stated, that in consideration of the agreement and memorandum, and of the premises, and that the plaintiffs would perform all things therein on their part, the defendant promised to perform all things therein on their part so far as concerned the interests of the plaintiffs; that the plaintiffs delivered the plans, &c.; that they withdrew all opposition to the bill; that *A.* did the same, &c., whereof the defendants had notice; assigning a breach in the non-payment of the 1000*l.*

Upon non assumpsit, held, that it might be inferred that the contract was not under seal.

Held also, that it was not such a contract as would fall within the exceptions to the general rule requiring corporate contracts to be by deed. But

Held also, that the contract having been *executed* on the part of the corporation, and the defendants having received the full consideration, the latter were bound by the contract, and the plaintiffs were entitled to sue thereon. *The Fishmongers' Company* v. *Robertson.* Page 131

ATTESTING WITNESS.

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EJECTMENT.
NEW TRIAL.

1. *A.* and *B.* directors of a joint-stock company, being sued for debts due from, and for damage done by, the company, employ *C.* an attorney to defend them, upon their joint responsibility. *A.* pays the whole of *C.*'s bill of costs. Held, that an action is maintainable by *A.* against *B.* for contribution. *Edger* v. *Knapp.* Page 753
2. If the plaintiff's attorney receives less than the sums indorsed for costs on the writ of summons, the defendant has nevertheless a right to have the sum so received referred to taxation under *R. H.* 2 *W.* 4. *Reg.* 11. *Hunter* v. *Russell.* 601
3. *A.* having a claim against *B.*, they went together to the office of *A.*'s attorney, who had never acted as attorney for *B.* A statement was made by *B.* relating to *A.*'s claim, and it was arranged that the attorney should, on the behalf of *B.*, write to a third party in respect of the subject matter of the claim. An action having been afterwards brought by *A.* against *B.*;

   Held, that the statement by *B.* was not a privileged communication.

   Held, also, that the writing of the letter, being an act done, might be proved by the attorney. *Shore* v. *Bedford.* Page 271
4. Articles of clerkship entered into in *March* 1829, were subsequently stolen. The court, in *Easter* term 1840 allowed a copy thereof to be inrolled, but not *nunc pro tunc* *Nash, ex parte.* 69
5. Appointed by corporation without deed, 182. (*o*)

BANKERS.

See BILLS AND NOTES.
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BANKRUPT.

See COGNOVIT.
INSOLVENT DEBTOR.
PLEADING.

1. In 1837, *A.* being in embarrassed circumstances, executed a deed to secure to his creditors a composition of 7*s.* in the pound. *B.* a creditor, refused to sign the deed until *A.* made *B.* a promise to give him security for the difference between the composition and the full amount of the debt. Pursuant to that agreement, *A.* subsequently handed over to *B.* his promissory notes, payable to *B.*'s order. *B.* indorsed the notes, and paid them into his bankers in the country to whom he was in the habit of indorsing bills and notes received by him, drawing generally on account. When the notes were at maturity the *London* correspondents of the

country bankers presented them to *A.*, by whom they were paid. *A.* continued to deal with *B.* down to his bankruptcy (in 1840) without having complained of the transaction, or attempted to set off the payments made in respect of the notes against the subsequent demands of *B.* against him. No evidence was given to shew the state of the account between *B.* and the country bankers at the time of the payments, or that *A.* knew the character in which the notes were held by the bankers who presented them. In an action for money paid by *A.* to the use of *B.*, brought by the assignees of *A.* to recover from *B.* the amount of these notes, the judge left it to the jury to say whether or not the payment was voluntary, telling them that if the payment was made to the bankers as *agents* only, it must be considered as voluntary; and that if they found the payment to be voluntary, and to have been made with a full knowledge of the circumstances, they must find for the defendant; otherwise, for the plaintiffs.

The court directed a new trial, in order that the attention of the jury might be more precisely called to the question, whether *A.* was aware of the character in which the bankers presented the notes for payment, namely, whether they presented them as agents of *B.* or as being themselves holders for value. *Gibson* v. *Bruce.* Pege 399

2. *A.* was appointed official assignee under a fiat in bankruptcy against *B.*, which on the 10th of *December* 1841 was annulled. On the 4th of *January* 1842 an action of trover was brought by *B.* for his books, &c. against *A.* On the 25th a second fiat was awarded against *B.* On the 22d of *February* the action was tried, when *B.* had a verdict for 1000*l.*, to be reduced to 40*s.* upon *A.*'s giving up the books, &c. On the 12th of *May B.* was adjudged a bankrupt, and on the 25th, *A.* was again appointed official assignee. *B.* did not surrender under the second fiat, and notice was given by the assignees to the attorney who had brought the action, not to take any further proceedings against *B.* The attorney, however, on the 8th of *July* entered an incipitur in the master's book, and gave notice of taxation. The court, on the application of *A.*, stayed all proceedings upon payment of the attorney's costs up to the date of the second fiat. *Ouchterlony* v. *Gibson.* Page 579

3. In an action by assignees of a bankrupt to recover money paid by the latter to the defendant, the judge, assuming in favour of the defendant, that the evidence of importunity and pressure by him was sufficient, left it to the jury to say whether the bankrupts had made the payments in consequence of such importunity and pressure, or with a view of giving the defendant a fraudulent preference in contemplation of bankruptcy.

Held, a direction of which *the defendant* had no right to complain. *Cook* v. *Pritchard*.
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BARON AND FEME.

See ALIENATION.
COPYHOLD.
DISTRINGAS.

In an action for boarding and lodging the defendant's wife, it appeared that they were living apart, but the circumstances of their separation were not explained. A letter from the plaintiff's attorney to the defendant, written during the time the wife was living in the plaintiff's house, was received in evidence, informing the defendant that she was getting into debt, and was anxious to return to him. To this the defendant returned no answer. The jury were directed to say whether the defendant thereby authorised the wife to contract for necessaries. Held, a misdirection. *Edwards* v. *Towels*. 624

BILLS AND NOTES.

See GUARANTEE.
LOAN SOCIETY.

1. *A.* was the holder of a foreign bill drawn upon *B.* in England, and accepted by *B.*, payable at the banking-house of *C.* On the morning when the bill became due, *D.*, *A.*'s banker, took the bill to the clearing-house in *London*, and put it into *C.*'s drawer. *C.* having examined the bill, and having funds of *B.*'s in his hands at the time, cancelled the acceptance by drawing lines across *B.*'s name without rendering the acceptance illegible. In the course of the day, *B.*, finding himself to be insolvent, ordered *C.* not to pay the bill; whereupon *C.* wrote thereon, "Cancelled by mistake — orders not to pay," and the bill was returned in this state to *D.* at the clearing-house before the settling hour. It is the usage in the trade in *London* so to cancel bills intended to be paid; and where a cancellation has occurred through mistake, to indicate the same by writing on the bill.

Held, that under these circumstances, no legal liability was cast upon *C.*, from which a promise could be inferred that he would pay the amount of the bill, or return it without having cancelled or destroyed the acceptance.

That the duty cast upon *C.* was no more than to take due care of the bill, and if he did not choose to pay it, to return it uncancelled, unless it had been cancelled by mistake, and in that case to indicate the same by writing on the bill.

That *C.* did use due care to prevent the acceptance from being defaced.

That the acceptance was an acceptance defaced and cancelled in point of fact; but that it was an acceptance cancelled by mistake. *Warwick* v. *Rogers*. Page 340

Semble, that a banker who omits to return or defaces a bill is not, in all cases, under an obligation to pay the amount;

But, *semble*, if he do so wrongfully, he becomes liable to an action on the case if the holder has sustained damage by such breach of duty.

Held, also, that under the circumstances above stated, *A.* could not sue *C.* for money had and received. *Warwick* v. *Rogers.* Page 340

The facts having been found by a special verdict,

Held, that the case was not within the 3 & 4 *W.* 4. *c.* 42. *s.* 24.

Held, also, that, after special verdict, the pleadings could not be amended. *Ibid.*

2. Where a person, not party to a bill, guarantees the payment by the acceptor, he is not entitled to require proof of presentment, or of notice of dishonour. *Hitchcock* v. *Humfrey.* 559

A plea to such a declaration, that the bill was not presented, and a plea that the defendant had no notice of non-payment, were held to contain no answer to the action; and the defendant, having obtained a verdict upon issues joined upon these traverses, the plaintiffs had judgment *non obstante veredicto.* *Ibid.*

3. *A.*, to whom *B.* was indebted, received a bill from *B.* "to get discounted, or return on demand." *A.* sent the bill to *C.*, with directions to place it to *A.*'s account with *C.*, which *C.* did, *minus* a sum deducted as discount.

Held, in trover for the bill by *B.* against *A.*, that this was substantially a discounting by *A.*, and that *A.* was entitled to a verdict under not possessed. *Wilkinson* v. *Whalley.* Page 590

4. *Semble* (per *Coltman* and *Creswell* JJ.), that *A.* was also entitled to the verdict under not guilty. *Ibid.*

5. In an action on a promissory note against *A.*, *B.*, and *C.*, the evidence as to the handwriting of *C.* was a retainer to defend the action, purporting to bear the signatures of *A.*, *B.*, and *C.*, upon which the attorney had acted without seeing *C.* Held, insufficient. *Drew* v. *Prior.* 264

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CARRIER.

1. In case against a carrier, where the duty is alleged to be, safely to carry and deliver, the grievance may be stated to be non-delivery within a reasonable time. *Raphael* v. *Pickford.* Page 551

2. And when the declaration alleged a contract to carry for hire, and stated the defendants' duty to be to carry safely and deliver, and the breach assigned was that a reasonable time for the delivery had elapsed, but that the defendants had not delivered the goods; it was held, that the plaintiff was entitled to recover upon proof of non-delivery within a reasonable time. *Ibid.*

CASE, ACTION ON THE.

See CARRIER.
NUISANCE.

CHARTERPARTY.

See SHIP.

CHURCHWARDENS.

By indenture between *A.* of the first part, *B.* of the second, and *C.*, *D.*, *E.*, and *F.*, of the third part; *A.* covenanted with *C.*, *D.*, *E.* and *F.*, to do certain repairs to the parish church of *Z.*, and in consideration of covenants on *A.*'s part, *C.*, *D.*, *E.* and *F.*, "churchwardens and overseers of the poor of the parish of *Z.*, for themselves, and for their successors, churchwardens and overseers of the said parish, and their assigns, did thereby covenant with *A.*, his executors and administrators, that they the said churchwardens and overseers of the poor, their successors or assigns, should and would well and truly pay, or cause to be paid unto *A.*" the sum specified, by certain instalments. After this covenant the deed provided that nothing therein contained should extend to any *personal* covenant of, or obligation upon, the several persons parties thereto of the third part, or in anywise *personally* affect them, any of them, their, or any of their executors, administrators, goods, effects, or estates, in their private capacity, but should be binding upon the churchwardens and overseers of the poor of the parish of *Z.*, and their successors, for the time being, as such churchwardens and overseers of the poor, but not further, or otherwise.

Held, that the covenant of *C.*, *D.*, *E.* and *F.*, was a personal covenant, and that the proviso, being repugnant thereto, was void. *Furnivall* v. *Coombes.* Page 736

COGNOVIT.

Money levied under a cognovit which has not been filed, and upon which no judgment has been signed, within twenty-one days, from its execution is void as against the assignees of an insolvent debtor, although the cognovit was given in a suit commenced adversely, and although the proceeds of the execu-

tion had been paid over to the judgment-creditor before the insolvency. *Biffin* v. *Yorke*.
Page 428

CONDITION.

1. Potestative. 176 (*h*).
2. Precedent. 809.

CONDITIONAL OBLIGATION.

176 (*h*).

CONSTRUCTION.

See DEED.
GUARANTEE.

CONTRA PACEM.

See FALSE IMPRISONMENT.

CONTRACT.

See AGREEMENT.
ASSUMPSIT.
CORPORATION.
PLEADING.

CONTRIBUTION.

A. and *B.*, directors of a joint-stock company, being sued in respect of liabilities incurred by the company, employ *C.* to defend them, upon their joint responsibility. *A.* pays the whole of *C.*'s bill. Held, that an action is maintainable by *A.* against *B.* for contribution. *Edger* v. *Knapp*. 753

COPYHOLD.

By the custom of a manor, a fine was due on the admittance of a remainderman, whether admitted at the same time as the tenant of the particular estate, or during the continuance of such estate. *A.*, a copyholder in fee of the manor, devised certain customary tenements to *B.* for life, remainder to *C.* and *D.* his wife, with benefit of survivorship, remainder to *E.* for life, remainder to *F.* in fee. *B.* was admitted, paying a fine of full two years' value, and died. The custom gave to the lord upon the admittance of *C.* and *D.* three years' value for a fine and a half (treating the wife *D.* as the party next in remainder), half a fine, being one year's value, from *E.*, and a quarter of a fine, being half a year's value, from *F.*

Held, that the mode of assessing the fine was reasonable; but

Held, also, that the fine having been calculated without making a deduction for repairs, was unreasonable. *Richardson* v. *Kensit*.
Page 485

CORPORATION.

A declaration in assumpsit by a corporation stated that the defendants had presented a petition to the House of Commons for leave to bring in a bill for draining certain waste lands, the introduction of which bill was opposed by the plaintiffs and also by *A.*; and that by a certain agreement made "between *B.* on behalf of the plaintiffs of the first part, *C.* on behalf of *A.* of the second part, and the defendants

of the third part, it was agreed that the plaintiffs and *A.* should withdraw all opposition to the bill; that the clauses therein should be settled by the solicitors of the parties, in order that the bill might be as perfect and beneficial as it could be made; that the plaintiffs and *A.* should use all reasonable means and endeavours to promote the progress of the bill; that part of the waste should be allotted to the plaintiffs and part to *A.*, in certain proportions; that the defendants would, on the passing of the act, pay the plaintiffs 1000*l.*; and that the defendants would pay all costs of obtaining the act; that by a memorandum indorsed upon the agreement, with the consent of all parties, and signed by *D.* as agent to the defendants, it was declared that the plaintiffs and *A.* were severally and jointly bound; that the 1000*l.* was to be paid to the plaintiffs for expenses incurred by them in a survey, and for plans, &c., of which the defendants were to have the benefit; but that the plans, &c. were to be returned to the plaintiffs if the 1000*l.* were not paid. The declaration then stated that, in consideration of the agreement and memorandum, and of the premises, and that the plaintiffs would perform all things in the agreement, &c. on their part, the defendants promised to perform all things therein on their part, so far as concerned the interests of the plaintiffs; that the plaintiffs delivered the plans, &c.; that they withdre all opposition to the bill; that did the same, &c.; whereof t defendants had notice, assigni a breach in the non-payment the 1000*l.*

Upon non-assumpsit, held, th it might be inferred that the co tract was not under seal.

Held, also, that it was not su a contract as would fall within t exceptions to the general rule quiring contracts entered into corporate bodies to be by dee But

Held, also, that the contra having been executed on the p of the corporation, and the d fendants having received the f consideration, the latter were bou by the contract, and the plainti were entitled to sue thereon. *T Fishmongers' Company* v. *Robe son.* Page 1

Semble, that if the contract h remained executory, the fact the corporation having put it suit, would have amounted to admission, on record, of their li bility under it, so as to estop the from disputing such liability in cross action. *Ib*

Semble, also, that up to the tin of the corporation adopting t contract by performing the co dition on their part, there was want of mutuality, as they cou not have been compelled to pe form the contract; and cons quently that the defendants, duri the interval, had the power to r tract. *Ibi*

Held, that the interest of the plaintiffs and of *A.* being several, the latter was properly omitted to be made a co-plaintiff. *The Fishmongers' Company* v. *Robertson.* Page 131

Held, also, that the agreement was not illegal, as against public policy. *Ibid.*

Held, also, that a plea, that the bill was not as perfect and beneficial as it might have been made, was no answer to the action. *Ibid.*

Held, also, that the using by the plaintiffs of all reasonable means and endeavours to procure the bill to pass was not a condition precedent, and therefore that a plea traversing the averment was bad. *Ibid.*

Held, also, that a plea stating that the plaintiffs had presented a petition to the House of Lords against the preamble of the bill, was bad, as an argumentative traverse of one of the two averments —as to withdrawing opposition, and as to using all reasonable means to promote the bill. *Ibid.*

Semble, that a plea directly traversing the averment that the plaintiffs withdrew their opposition, was good. *Ibid.*

COSTS.

See NEW TRIAL.
PRACTICE, 30. 32.
RAILWAY COMPANY.
WRIT OF TRIAL.

1. If the plaintiff's attorney receives less than the sum indorsed for costs on the writ of summons, the defendant has nevertheless a right to have the sum so received referred to taxation under *R. H.* 2 *W.* 4. *reg.* 11. *Hunter* v. *Russell.* Page 601

2. Power of jury over. 723. n.

3. In an action by *A.* against *B.*, *B.* gave notice to *C.*, against whom *B.* had a remedy over, to come in and defend the action. *C.* refused to do so, but did not prohibit *B.* from continuing the defence. *B.* suffered judgment by default, and watched the proceedings under the writ of inquiry, putting *A.* to the proof of his claim.

At the trial of the action over by *B.* against *C.*, the jury included in their verdict the costs incurred by *B.* in the former action, no objection being then taken by *C.* to the right of *B.* to recover such costs. The court refused to disturb the verdict, being of opinion that there was evidence to go to the jury that *C.* had sanctioned the incurring of these costs. *Blyth* v. *Smith.* 405

COVENANT.

By indenture between *A.* of the first, *B.* of the second, and *C.*, *D.*, *E.* and *F.* of the third part; *A.* covenanted with *C.*, *D.*, *E.*, and *F.*, to do certain repairs to the parish church of *Z.*, and in consideration of covenants on *A.*'s part, *C.*, *D.*, *E.*, and *F.*, "churchwardens and overseers of the poor of the parish of *Z.* for themselves, and for their

successors, churchwardens, and overseers of the said parish, and their assigns, did thereby covenant with *A.*, his executors, and administrators, that they the said churchwardens and overseers of the poor, their successors or assigns, should and would, well and truly, pay or cause to be paid unto *A.*" the sum specified, by certain instalments. After this covenant, the deed proceeded as follows :— "Provided always, that nothing in these presents contained shall extend, or be deemed, adjudged, construed, or taken to extend, to any *personal* covenant of, or obligation upon the several persons parties hereto, of the third part, or in any wise *personally* affect them, any or either of them, their, or any or either of their executors, administrators, goods, effects, or estates in their private capacity, but shall be, and is intended to be, binding and obligatory upon churchwardens and overseers of the poor of the parish of *Z.* and their successors, for the time being, as such churchwardens and overseers of the poor ; but not further, or otherwise."

Held, that the covenant of *C.*, *D.*, *E.*, and *F.*, was a personal covenant, and that the proviso, being repugnant thereto, was void. *Furnivall* v. *Coombes.* Page 736

DAMAGES.

Ghilners v. *Greaves.*

See DEFAMATION.

DEATH.

See PRACTICE.

DEFAMATION.

1. Held, that in an action for defama tion, either party may, with a viev to the damages, give evidence t prove or disprove the existence o a malicious motive. *Pearson* v *Lemaitre.* Page 70
2. But if the evidence given for ths purpose, establishes another caus of action, the jury should be cau tioned against giving any damage in respect of such other cause c action. *Ibi*

DEVISE.

Devise (in a will anterior to the 1 of *January*, 1838) as follows:- "As to my messuages, lands, ten ments, and real estate, I devis unto *A.* and his heirs, *Whiteac* and *Blackacre*, and all other m messuages, lands, tenements, an hereditaments, which may not b herein particularly described c mentioned; and I do further b queath to my wife all my jewel plate, &c., and other goods, cha tels, and effects whatsoever, as h own goods and chattels for eve and appoint her sole executrix &c. At the date of the will, a at his death, the testator was po

sessed of certain leaseholds, but had no other real estates than *Whiteacre* and *Blackacre*. Held, that the leaseholds did not pass to *A.* *Parker* v. *Marchant.* Page 499

2. Devise of realty to *A.* "for, and during the natural life of *A.*, and from and after his decease, unto all and every the issue of the body of *A.*, share and share alike, as tenants in common, and the heirs of such issue."

Held, that *A.* took an estate *for life* only. *Greenwood* v. *Rothwell.* 628

DISCOUNT.

1. *A.*, to whom *B.* was indebted, received a bill from *B.* "to get discounted, or return on demand." *A.* sent the bill to *C.*, with directions to place it to *A.*'s account with *C.*, which *C.* did, minus the discount.

Held, in trover for the bill, by *B.* against *A.*, that this was, substantially, a discounting of the bill by *A.*, and that *A.* was entitled to a verdict under a plea of not possessed. *Wilkinson* v. *Whalley.* 590

2. *Semble* (per *Coltman* and *Creswell* JJ.), that *A.* was also entitled to the verdict under the plea of not guilty. *Ibid.*

DISTRINGAS.

Semble, that where service of the writ of summons is upon the defendant's wife, the plaintiff should not enter an appearance, but should move for a distringas. *Todd* v *Crosby.* Page 590

DUPLICITY IN PLEADING.

See 335 (*b*).

EJECTMENT.

1. Service of a declaration in ejectment at the office of the tenant, an attorney, upon his clerk, who accepted the service, was held sufficient. *Doe dem. Gower* v. *Roe.* 375

2. Held, that it is competent to a judge at nisi prius to amend the declaration, &c., by altering the date of the demise,—which was subsequent to that on which the right of entry accrued, but was a day which had not arrived when the action was brought, and when it was tried, — to an earlier date without any thing to amend by, except the necessity of the amendment to the maintenance of the action. *Doe dem. Simson* v. *Hall.* 795

3. The regular service of a notice to quit was held to have been properly inferred from the circumstance of the tenant's speaking of "the notice to quit which he had received," and engaging a valuer to value his rights as an outgoing tenant. *Ibid.*

ESTATE.

See DEVISE.

ESTOPPEL.

See PLEADING.

EVIDENCE.

See DEFAMATION.
STAMP.

1. In an action on a joint and several promissory note against *A.*, *B.*, and *C.*, the only evidence as to the handwriting of *C.* was a retainer to the attorney to defend the action, purporting to bear the signatures of the three defendants, upon which the attorney had acted without having ever seen *C.*, or being otherwise acquainted with his handwriting: Held, no evidence of the handwriting of *C.* *Drew* v. *Prior.* Page 264
2. *A.* having a claim against *B.*, they went together to the office of *A.*'s attorney, who had never acted as attorney for *B.* A statement was made by *B.* relating to *A.*'s claim; and it was arranged that the attorney should, on the behalf of *B.*, write to a third party in respect of the subject-matter of the claim. An action having been afterwards brought by *A.* against *B.*:

   Held, that the statement by *B.* was not a privileged communication. *Shore* v. *Bedford.* 271
3. Held, also, that the writing of the letter, being an act done, might be proved by the attorney. *Ibid.*
4. In an action by *A.* against *B.* for commission due to *A.*, as agent for *B.* in procuring him an apprentice, *B.* produced the deed of apprenticeship under notice; and there being an attesting witness to it, who was not called, *A.* was nonsuited.

   Held, that as *B.* did not claim under the deed any interest in the subject-matter of the cause, the case did not fall within the exception to the rule requiring proof of the execution of an instrument. *Rearden* v. *Minter.* Page 204
5. Held, also, that *A.* was not entitled to a new trial on the ground of surprise, though he was not aware before the trial that there was an attesting witness; it not appearing that he had made any inquiry on the subject. *Ibid.*

EXECUTION.

See PRACTICE.

1. The court refused to discharge a judge's order, made under the 1 & 2 *Vict. c.* 110. *s.* 14, to charge stock, standing in the names of trustees for the defendant. *Rogers* v. *Holloway.* 292
2. The stock had been transferred into the names of the trustees by a deed of settlement, made pursuant to an order of the court of Chancery. *Quære*, whether a court of common law has jurisdiction to interfere in the matter. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

See AFFIDAVIT, 3.

An administrator may maintain trespass for acts done after the death of the intestate, and before the grant of administration; the rule that a party cannot be made a trespasser by relation, being only applicable where the act complained of, was lawful at the time it was done. *Tharpe* v. *Stallwood*. Page 760

FALSE IMPRISONMENT.

See MISNOMER.

To a declaration for false imprisonment, the defendant pleaded that the plaintiff with force and arms came to the door of the defendant's house, and with great force and violence attempted to enter against the will of the defendant, and wilfully and wantonly rang the door bell, without lawful occasion, and made a great noise and disturbance, to the annoyance and disturbance of the defendant, and against the peace of the Queen, and (after request to cease) continued making such noise, &c., without any lawful excuse; and thereupon the defendant, in order to preserve peace and render good order and tranquillity in his house, gave the plaintiff in charge to a policeman.

The plea was held bad, as not shewing that, at the time the plaintiff was given in charge, he was committing a breach of the peace, or that there was reasonable ground for apprehending that a breach of the peace would be committed. *Grant* v. *Moser*. Page 123

FELONY.

See INSURANCE, 1.

FEOFFMENT.

Can be accepted by corporation only by deed, 182 (*e*).

FINE.

See COPYHOLD.

FIXTURES.

See AGREEMENT.

1. The acceptance of a demise of a house containing fixtures does not raise an implied contract to pay for such fixtures. *Goff* v. *Harris*. 573
2. In debt for rent and for fixtures sold, the plaintiff claimed by his particulars 5*l*. 5*s*. for rent, and 12*l*. for fixtures. The defendant paid 11*l*. 5*s*. into court. Held, no admission of liability in respect of fixtures to a greater amount than 11*l*. 5*s*. *Ibid*.

FRAUD.

See BANKRUPT.

FRAUDS, STATUTE OF.

See GUARANTEE.

FRAUDULENT PREFERENCE.

See BANKRUPT.

GAMING.

1. *Semble*, that money lent for the purpose of enabling the borrower to play at skittles, for a less stake than 10*l.*, may be recovered by the lender. *Foot* v. *Baker.* Page 335

2. *Secus*, where the lender is a licensed publican who lends money to his guests to enable them so to play. *Ibid.*

GOODS.

See FIXTURES.

GUARANTEE.

The following memorandum: — "I hereby guarantee *B.*'s account with *A.* for wines and spirits to the amount of 100*l.*"—there being at the time of the giving of such guarantee an existing account between *A.* and *B.*, upon which *B.* was indebted to *A.* (though in a less sum than 100*l.*), was held to be a guarantee for the payment of such existing account, and not to extend to future supplies of goods. *Allnutt* v. *Ashenden.* 393

2. A person who guarantees the payment by the acceptor of a bill to which he is not a party is not entitled to require proof of presentment or of notice of dishonour. *Hitchcock* v. *Humfrey.* 559

3. A plea to such a declaration that the bill was not presented, and also a plea that the defendant had no notice of non-payment, were held to contain no answer to the action; and the defendant having obtained a verdict upon issues joined upon traverses of these pleas, the plaintiff had judgment *non obstante veredicto*. *Hitchcock* v. *Humfrey.* Page 559

4. The defendant having guaranteed the payment of goods to be supplied by the plaintiffs to *A.* up to 1st of *July*, gave on the 9th of *April* the following additional guarantee. "In consideration of your extending the credit already given to *A.*, and agreeing to draw upon him at three months from the 1st of the following month for all goods purchased up to the 20th of the preceding month, I hereby guarantee the payment of any sum that shall be due and owing to you, upon his account for goods supplied."

Held, a *continuing* guarantee.

Held, also, substantially a guarantee for the payment of the price of the *goods* sold to *A.*, and not of the amount of the *bill* drawn upon him. *Ibid.*

5. The declaration upon the guarantee stated that the bill was drawn by the plaintiffs, and accepted by *A.*, but that he did not pay the amount thereof, although the bill was presented when due; of all which the defendant had notice, and was requested to pay the amount of the bill; to wit, &c.; but the same still remained due.

Held, a sufficient allegation of the non-payment of the price of the goods. *Ibid.*

HOLIDAYS.

See PRACTICE, 3.

INDUCEMENT, 332. n.

INROLMENT.

See LOAN SOCIETY.

INSANITY.

Party not allowed to set up his own imbecility of mind to avoid a civil liability, where no fraud has been practised. Page 670 n.

INSOLVENT DEBTOR.

See COGNOVIT.

1. A debt accruing to an insolvent between the vesting order and the final discharge, passes to his assignee, under 1 & 2 *Vict. c.* 110. *s.* 37. *Ford* v. *Dabbs.* 309
2. An interim order by a commission of bankrupt for the protection of an insolvent (under 5 & 6 *Vict. c.* 116. *s.* 1.), if in the form prescribed in the rules promulgated by the judges and commissioners of the court of Bankruptcy (under sect. 13.), is sufficient, and need not shew on the face of it the jurisdiction of the commissioner to make such order. *Marsh* v. *Woolley.* 675
3. A defendant having been arrested after such an interim order had been in fact made (but before notice to the sheriff or the plaintiff); this court ordered his discharge, although the jurisdiction of the commissioner did not appear, either by the order itself, or by the affidavits upon which the application to this court was made; but they refused to give costs against the sheriff or against the plaintiff. *Marsh* v. *Woolley.* Page 665
4. In 1837 *A.* being in embarrassed circumstances, executed a deed to secure to his creditors a composition of 7*s.* in the pound. *B.*, a creditor, refused to sign the deed until *A.* made *B.* a promise to give him security for the difference between the composition and the full amount of the debt. Pursuant to that agreement, *A.* subsequently handed over to *B.* his promissory notes, payable to *B.* or order. *B.* indorsed the notes, and paid them into his bankers at *Leeds*, to whom *B.* was in the habit of indorsing all bills and notes received by him, drawing generally on account. When the notes were at maturity, the *London* correspondents of the *Leeds* bankers presented them to *A.*, by whom they were paid. *A.* continued to deal with *B.* down to his bankruptcy (in 1840), without ever complaining of the transaction or attempting to set off the payments made in respect of the notes against the subsequent demands of *B.* against him. No evidence was given to shew the state of the account between *B.* and the *Leeds* bankers at the time of the payments, or that *A.* knew the cha-

racter in which the notes were held by the bankers, who presented them. In an action for money paid by *A.* to the use of *B.* brought by the assignee of *A.* to recover back the amount of these notes, the judge left it to the jury to say whether or not the payment was voluntary, and told them that if the payment was made to the bankers as *agents* only, it must be considered as voluntary; and that if they found the payment to be voluntary, and to have been made with a full knowledge of the circumstances, they must find for *B.*, otherwise for the plaintiffs.

The court directed a new trial, in order that the attention of the jury might be more precisely called to the question — whether *A.* was aware of the character in which the bankers presented the notes for payment; namely, whether as agents of *B.*, or as holders for value. *Gibson* v. *Bruce.* Page 399

INSURANCE.

See NEGLIGENCE.

1. A policy on the life of *A.* contained a proviso, that in case *A.* should die by his own hands, or by the hands of justice, or in consequence of a duel, "the policy should be void." *A.* threw himself into the *Thames*, and was drowned. Upon an issue whether *A.* died by his own hands, the jury found that *A.* "voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, and intending thereby to do so; but that at the time of committing the act, he was not capable of judging between right and wrong."

Held (*Tindal* C. J. *dissentiente*), that the policy was avoided, as the proviso included all acts of voluntary self-destruction, and was not limited by the accompanying provisoes to acts of *felonious* suicide. *Borradaile* v. *Hunter.* Page 639

2. In case against an insurance-broker, for not effecting an insurance pursuant to his retainer, the declaration stated that the defendant was retained and employed to cause an insurance to be made on the plaintiff's ship, tackle, &c., against the perils of the sea, &c., and that he accepted such retainer and employment; and alleged for breach, that although a reasonable time had long before elapsed, and before the loss of the ship, yet the defendant did not, nor would, within such reasonable time, cause to be made insurance upon the said ship, tackle, &c., and did not, nor would, cause the same to be insured, or cause a policy of insurance to be made thereon, from and against the perils of the sea, &c., nor did nor would cause the plaintiff to be insured in respect of the said ship, tackle, &c., from and against such perils, nor did nor would cause to be made thereon any insurance or policy of insurance, subscribed or under-

written; but the defendant so to do had wrongfully, and in breach of his duty and retainer, wholly neglected and refused; whereby, the vessel being lost, the plaintiff was without the benefit of insurance.

Upon an issue upon a plea of not guilty, it was shewn that the defendant had contracted with an insurance company for an insurance on the plaintiff's ship, tackle, &c., and shortly afterwards obtained from the secretary of the company what purported to be a copy of the policy. A stamped policy was afterwards subscribed, but was not given out, the practice of the company being, to retain possession of policies until they were wanted in consequence of a loss. There was no evidence to shew the precise time when the stamped policy was actually executed; but it was proved that it was usual to execute policies very shortly after the receipt of orders. A demand of the policy was made on the part of the plaintiff after the loss of the vessel; to which the defendant gave an evasive answer. The judge left it to the jury to say whether or not the defendant had procured the policy to be executed within a reasonable time. The jury having found for the plaintiff, and the judge being satisfied with the verdict, the court refused to grant a new trial. *Turpin* v. *Bilton*. Page 455

3. Held, also, on motion in arrest of judgment, that the action was founded on an express contract, and that the declaration was sufficient, the terms of the breach not being larger than the terms of the contract. *Turpin* v. *Bilton*. Page 455

INSURANCE BROKER.

See INSURANCE, 2.

INTEREST IN LAND.

See PRACTICE, 23.

Cannot vest in, or be divested out of, a corporation, otherwise than by deed. 183 (*a*).

INTEREST OF MONEY.

See PRACTICE.

1. Where an old warrant of attorney had been given to secure a debt and interest, the sum for which judgment was to be confessed being for the amount of the debt only, the court granted a rule to enter up judgment for the debt, and so much for interest as the master should find to be due thereon. *Chalk* v. *Walton*. 573
2. The court allowed a *distringas* to compel appearance to issue, although the writ of summons was indorsed for "*50l.* for debt and interest thereon," without stating any time from which the interest was to be completed. *Fitzgerald* v. *Evans*. 207

INTERIM ORDER.

See INSOLVENT DEBTOR.

IRREGULARITY.

See PRACTICE.
PRISONER.

JOINT-STOCK COMPANY.

See RAILWAY ACT.

1. *A.* and *B.*, directors of a joint-stock company, being sued for debts due from, and for damage done by the company, employ *C.* to defend them upon their joint responsibility, *A.* pays the whole of *C.*'s bill. Held, that an action is maintainable by *A.* against *B* for contribution. *Edger* v. *Knapp.* Page 753

2. The declaration stated that, on the 24th of *December* 1835, by an agreement in writing then made, it was agreed that certain bills which had been drawn upon a company (of which the defendant was a member) should be taken up by the plaintiffs; that in the event of the plaintiffs declining to take shares in the company, which they had the option to do, the defendant should repay the sums advanced by the plaintiffs, at any time after the 1st of *October* then next, on the company having three months' previous notice requiring such payment. The declaration, entitled of the 16th of *December* 1836, further stated that after the making of the agreement, and more than three calendar months before the commencement of the action, the plaintiffs gave notice to the company that they declined to take shares, and required payment, at the expiration of three calendar months then following, of the sum advanced by them.

Held, that, notwithstanding the day of the making of the agreement was under a *videlicet*, it sufficiently appeared, on the face of the declaration, that *a first* of *October* had elapsed before action brought. *Harrison* v. *Heathorn.* Page 522

Held, also, that an allegation that *B.* and *C.* were allowed and permitted to realise, and were entrusted with, the assets of the company by the other shareholders, was not supported by the facts. *Ibid.*

Held, also, that the resolutions contained no contract upon which any right of action arose, even as between *B.*, *C.*, *D.* and *A.* *Ibid.*

The directors of a dissolved joint-stock company, who, at the request of the shareholders, undertook the winding up of the concern, were held not to contract at law with the shareholders for the due performance of the terms upon which the winding up of the concern was to take place. *Ibid.*

3. *A.*, *B.*, *C.*, *D.*, and others, carried on the business of bankers under the provisions of the act of 7 *G.* 4. *c.* 46, for some years prior to and upon the 29th of *August* 1839, upon the terms contained in two deeds of 1st *July* 1834, and the 30th *August* 1836, the former deed stating the circumstances under which, and the manner in

which, the company might be dissolved at an extraordinary general meeting of the shareholders, called for that purpose by a certain board of directors, of which *B.*, *C.* and *D.* were members. In the company, *A.* held 100 shares of 10*l.* each. The board called an extraordinary general meeting of the shareholders, to be holden on the 29th of *August* 1839, pursuant to the provisions of the deed of 1834. At the meeting so called, the shareholders present passed resolutions in conformity with the provisions of the deed of 1834; that the company was thereby dissolved; that the winding up of its affairs should be entrusted to the then board of directors, with power to employ and pay for such assistance as might be necessary; that any three directors might act; that the assets should be realised with all convenient speed, and that the portion not required to meet the engagements of the company, should be divided amongst the shareholders ratably, in such dividends as the directors might deem fit; a dividend to be declared at least *once* in every six months; a copy of the proceedings and resolutions to be transmitted to every shareholder; no transfer to parties not already shareholders to be permitted. No shareholder present at the meeting was desirous of continuing the concern. Neither *A.* nor *B.* was present at the meeting, but a copy of the state of the said proceedings and resolutions was transmitted to *A.* and the other shareholders. From the 29th *August* 1839, the business of the company, except so far as was necessary for winding up the affairs, was discontinued, and *B.*, *C.* and *D.*, in pursuance of the said resolutions, proceeded to wind up the affairs of the company:

Held, that the company was duly dissolved, and that, notwithstanding the power to wind up the concern, an allegation in a declaration that the company had altogether ceased and determined, was correct. *Lyon* v. *Haynes.*

Page 504

Held, also, that the partnership having been dissolved, the shareholders present had no authority to pass resolutions binding those who were absent, and that such resolutions could only be considered as an agreement by and amongst the individual parties present, and did not support an allegation in a declaration that the agreement was by and between *all* the shareholders. *Ibid.*

4. Raising and transferring stock is not a nuisance at common law.

Held, therefore, that a plea to a count in assumpsit for money lent, stating that the plaintiff and defendant, and other persons, did illegally associate in a certain illegal undertaking, tending to the common nuisance of the subjects, that is to say, that the plaintiff defends, and the other persons did act as a corporate body, and pre-

tending to be a trading corporation under the name, &c., and did pretend to raise and transfer stock in the said company, and that the said stock consisted of, &c., and did pretend to transfer and assign shares in such stock without legal authority by act of parliament, charter, or letters patent, &c., and that the money was lent for the purpose of furthering such illegal undertaking, was bad, as not describing such an illegal association as would constitute a nuisance at common law. (a) *Garrard* v. *Hardey.* Page 471

Held, also, that a plea to such a count, stating that the money was lent for the purpose of carrying on a trading co-partnership, and that the plaintiff afterwards became a member thereof, and that complicated accounts arose between the plaintiff and the defendant in respect of such co-partnership, which included the sum lent, was no answer to the action. *Ibid.*

5. In an action for calls after the cause had been set down for trial, and made a remanet, the defendant applied to set aside the proceedings, upon the ground that the company was virtually extinct, and that the parties who had instituted the action had no authority to do so.

Held, that the application was too late, it appearing that the defendant had known all the facts for a long time.

(a) And see *Harrison* v. *Heathorn*, *post*, Vol. VI. p. 80.

Held, also, that as such parties had been for some time acting as directors, the court would not, upon summary application, inquire into the validity of their appointment; although it was provided, by the act incorporating the company, that at the trial it should only be necessary to prove certain matters, without proving the appointment of the directors. *Thames' Haven Dock and Railway Company* v. *Hall.* Page 274

6. The declaration, which was in the form given by the act, stated that the plaintiffs appeared by *G. S.*, their attorney; the defendant having pleaded over.

Held, that the appointment of the attorney might be presumed to be under seal. *Ibid.*

7. The court refused to allow the defendant in a late period of the cause to add a plea so as to raise that question on the record. *Ibid.*

8. The defendant was a party to a contract in *February* for procuring the act which was obtained in *June*, and his name appeared in it as a subscriber to the undertaking, and in *September* he executed a deed of settlement, which recited that the company was in operation. The goods in respect of which the action was brought were supplied in *July*. Held, that there was sufficient evidence from which the jury might infer that the defendant was a partner at the time the goods were furnished. *Ibid.*

9. A private act, passed to enable a manufacturing company to pur-

chase certain patents, and to sue and be sued, enacted that in all actions, &c. to be instituted or prosecuted against the company, "it shall be sufficient to state the name of the secretary or some one of the directors, — or where there shall be no secretary or director, then the name of some one of the shareholders for the time being of the company, — as the nominal defendant representing the company in such proceedings;" and provided for the reimbursement, &c. of shareholders who might be sued "in any other manner than under the powers and authorities thereinbefore given," and enacted, "that nothing therein contained should extend to exonerate the company or any of the shareholders thereof from any responsibility, duty, contract or obligation whatever, to which by law they then were, or at any time thereafter might be, subject or liable, either as between such company and other parties, or as between the company or any of the individual shareholders thereof and others, or as between themselves, or in any manner whatever."

Held, that the act was not imperative upon a creditor to sue in the manner pointed out, but that he might exercise his common law right of proceeding against any individual shareholder. *Beech* v. *Eyre.* Page 415

JUDGE'S ORDER.

See PRACTICE.

JUDGMENT.

See PRACTICE.

JUDGMENT AS IN CASE OF A NONSUIT.

1. The court refused to re-open a rule for a judgment as in case of a nonsuit, upon the ground that the affidavit, on which it had been discharged, was false. *Bickley* v. *Fell.* Page 695
2. It is no objection to a motion for such judgment, where a clear default has been committed, that a similar application was unsuccessfully made in the previous term upon an affidavit, which left it doubtful, whether the application was not then made too soon. *Withers* v. *Spooner.* 721

JURISDICTION.

See EXECUTION, 2.
INSOLVENT DEBTOR, 2.

LEASE.

1. The acceptance of a demise of a house does not raise an implied contract to pay for the fixtures. *Goff* v. *Harris.* 573
2. In debt for rent on a demise for years, with a count for fixtures sold, the plaintiff claimed by his particulars 5*l.* 5*s.* for rent, and 12*l.* for fixtures. The defendant paid 11*l.* 5*s.* into court. Held, no admission of the defendant's liability in respect of fixtures to a greater

amount than had been paid into court. *Goff* v. *Harris.* Page 573

LEASEHOLD.
See DEVISE.

LIBEL.
The tendency of the publication, not the intention of the writer, is the point proper to be submitted to the jury. 720 *n.*

LICENCE.
See AGREEMENT.

LICENSED VICTUALLER.
See GAMING.

LIFE ESTATE.
See DEVISE.

LIFE INSURANCE.
See INSURANCE, 1.

LOAN SOCIETY.
1. A society established pursuant to the provisions of the 5 & 6 *W.* 4. *c.* 23, becomes entitled to the benefit of those provisions, upon its rules and regulations being certified, and before they are inrolled at the quarter sessions. *Bradburne* v. *Whitbread.* 439
2. One of the rules directed that the repayment of loans should be secured by the joint promissory note of the borrower and his sureties, but gave a form of note which was joint and several. Held, that a joint and several note was a note made in pursuance of the rules of the society, so as to come within the exemption from stamp duty created by 5 & 6 *W.* 4. *c.* 23. s. 7. *Bradburne* v. *Whitbread.* Page 439

LUNATIC.
See INSANITY.

MALICE.
See DEFAMATION.

MANOR.
See COPYHOLD.

MEMORANDA, 798.

MISDIRECTION.
See BARON AND FEME.
1. The plaintiff's counsel at the trial interrupted the summing up, conceiving that there was a misdirection in law, and elected to be nonsuited. The court allowed him to move to set aside the nonsuit. *Wilkinson* v. *Whalley.* 59
2. Query (per *Cresswell* J.), whether a plaintiff is strictly entitled so to do. *Ibid.*

MISNOMER.
1. In trespass by *A. B.*, the defendant justifies under a *ca. sa.* against "the now plaintiff" without otherwise describing him. The justification is established by the production of a *ca. sa.* against *C. B.*, and proof that in the former action the now plaintiff was the party sued by the name of *C. B.* *Fisher* v. *Magnay.* 778

2. *Semble*, that the plea would have been more formal if it had alleged that the *ca. sa.* was against *C. B.*, and that *C. B.*, the party against whom the *ca. sa.* issued, and *A. B.*, the now plaintiff, were one and the same person. *Fisher* v. *Maynay*. Page 778

3. And although it had been alleged that the *ca. sa.* was against *C. B.*, the averment of identity would have been sufficient without averring that the plaintiff was known as well by one name as by the other. *Ibid.*

NEGLIGENCE.

See INSURANCE.

NEW TRIAL.

See MISDIRECTION.

1. The rule as to not granting a new trial on payment of costs where the trial is by writ of trial, and the verdict is under *5l.*, applies to a case in which the amount claimed by the plaintiff by his particulars exceeds *5l.*, but is reduced by payment into court below that sum, although the verdict be for the defendant. *Watts* v. *Judd*. 598

2. The court will not grant a new trial upon the ground of surprise, merely because the unsuccessful party has neglected properly to instruct his attorney. *Tharpe* v. *Stallwood*. 760

3. In an action by *A.* against *B.* for commission due to *A.* as agent for *B.* in procuring him an apprentice, *B.* produced the deed of apprenticeship under notice, and there being an attesting witness to it, who was not called, *A.* was nonsuited.

Held, that as *B.* did not claim under the deed any interest in the subject-matter of the cause, the case did not fall within the exception to the rule requiring proof of the execution of an instrument. *Rearden* v. *Minter*. Page 204

4. Held, also, that *A.* was not entitled to a new trial on the ground of surprise, though he was not aware, before the trial, that there was an attesting witness; it not appearing that he had made any inquiry on the subject. *Ibid.*

NONSUIT.

See NEW TRIAL.

1. The plaintiff's counsel at the trial interrupted the summing up, conceiving that there was a misdirection in law, and elected to be nonsuited. The court allowed him to move to set aside the nonsuit. *Wilkinson* v. *Whalley*. 590

2. Query (per *Cresswell* J.), whether a plaintiff is strictly entitled so to do. *Ibid.*

3. Where the plaintiff was nonsuited upon the opening speech of his counsel, and it afterwards was shewn by affidavit that his witness could have proved a good cause of action not stated in the opening speech, the court granted a new

trial upon payment of costs. *Edger* v. *Knapp.* Page 753

NOTICE OF OBJECTION.

See PATENT.

NOTICE TO A CORPORATION. 182 (*c*)

NOTICE TO QUIT.

See EJECTMENT, 3.

NUISANCE.

See JOINT-STOCK COMPANY.

1. Case. The declaration stated that the plaintiff was possessed of a public-house abutting upon a navigable river, and that the defendant wrongfully and maliciously placed upon the said river and kept there for a long space of time, to wit, from thence hitherto certain timbers, so as to drift opposite the plaintiff's house, whereby the access thereto was obstructed, and persons, who would otherwise come to the house and taken refreshments there, were prevented. Plea not guilty.

   Held, upon motion for a new trial for misdirection, that it was not a question for the jury whether the plaintiff had sustained any special damage. *Rose* v. *Groves.* 613

2. *Semble*, in arrest of judgment, that the declaration did not allege any public nuisance; and held, that at any rate, it disclosed a private injury to the plaintiff. *Ibid.*

3. Held, also, that the allegation that the grievance had continued *hitherto*, was immaterial. *Rose* v. *Groves.* Page 613

OBJECTION.

See PATENT.

OBLIGATION, CONDITIONAL. 176 (*b*)

PATENT.

1. The notice of objections to a patent delivered by the defendant under stat. 5 & 6 *W.* 4. *c.* 83. *s.* 5, ought to contain more particular formation than that which is necessarily conveyed by the defendant's pleas. *Jones* v. *Berger.* 208

2. In an action for the infringement of a patent "for improvements in treating, or operating upon farinaceous matter and other products, and in manufacturing starch," one objection stated, that the alleged invention had been published in the specification of two previous patents (particularising them), and also by other persons in other books and writings: Held, that the books &c. should be specified. *Ibid.*

3. A second objection stated, that the plaintiff's specification did not sufficiently distinguish between

what was old and what was new: Held sufficient, as the objection was — to an omission in the specification. *Jones* v. *Berger*. Page 208

4. The same objection alleged that the plaintiff did not state in his specification "the most beneficial method with which he was then acquainted, of practising his said invention:" Held, sufficiently precise. *Ibid.*

5. A third objection stated that the invention was in use by many persons before the patent, and particularly that the use of rice starch was "known and practised by persons engaged in the manufacture and finishing of lace and similar fabrics at *Nottingham* and elsewhere:" Held, that upon striking out the words "and elsewhere" the objection was sufficiently precise.

6. *Semble*, per *Maule*, that it was sufficiently so without striking out these words. *Ibid.*

PAYMENT OF MONEY INTO COURT.

See LEASE.

PENALTIES.

In a *qui tam* action for penalties the court refused to stay the proceedings or to give the defendant further time to plead, upon a suggestion, by affidavit, that an act of parliament was likely to be passed, the effect of which would be, to relieve the defendant from the penalties. *Grant* v. *Ridley*. 201

PLEADING.

See AFFIDAVIT.
PATENT.

1. A plea in assumpsit setting out three commissions of bankrupt against the plaintiff, one fiat, and two discharges, under insolvent debtors' acts, and alleging that the plaintiff's estate did not on any occasion produce 15*s*. in the pound, is bad for multiplicity. *Alexander* v. *Townley*. Page 300

2. The court permitted the defendant to amend on payment of costs, but refused leave to plead the various bankruptcies &c., in several pleas. *Ibid.*

3. The declaration stated, that on the 24th of *December* 1835, by an agreement in writing then made, it was agreed that certain bills which had been drawn upon a company (of which the defendant was a member) should be taken up by the plaintiffs; that in a certain event which happened, the defendant should repay the sums advanced by the plaintiffs at any time after the 1st of *October* then next, on the company having three months' previous notice requiring such payment. The declaration, entitled of the 16th of *December* 1836, further stated that, after the agreement, and after the happening of the event, and more than three calendar months before the commencement of the action, the plaintiffs required payment at the expiration of three calendar months

then following of the sum advanced by them.

Held, that notwithstanding the day of the making of the agreement was under a *videlicet*, it sufficiently appeared on the face of the declaration, that a 1st of *October* had elapsed before action brought. *Harrison* v. *Heathorn.* Page 322

4. A rejoinder in trespass *quare domum fregit*, setting out a proviso for re-entry, in case the rent, which was reserved half-quarterly, should be unpaid on any day on which the same should become due, or within ten days afterwards, and averring that the rent for *one year* being due and unpaid, they, as servants of the landlord, entered, &c. (without alleging that the entry was made after the expiration of ten days from the time that any half-quarter became due), is bad, for duplicity, as setting up either seven or eight half-quarterly periods at which rights of entry accrued. *Kavanagh* v. *Gudge.* 727

5. The proviso being considered by the court to be in the nature of a right of re-entry for a forfeiture, leave to amend was refused. *Ibid.*

6. In a case against a carrier, where the duty is alleged to be, safely to carry and deliver, the grievance may be stated to be non-delivery within a reasonable time. *Raphael* v. *Pickford.* 551

7. And where the declaration alleged a contract to carry for hire, and stated the defendant's duty to be to carry safely and deliver, and the breach assigned was that a reasonable time for the delivery had elapsed, but that the defendant had not delivered the goods: it was held, that the plaintiff was entitled to recover upon proof of non-delivery within a reasonable time. *Raphael* v. *Pickford.* Page 551

8. To a declaration by *A.* against *B.* for false imprisonment, *B.* pleaded that *A.*, with force and arms came to the door of *B.*'s house, and with great force and violence attempted to enter against the will of *B.*, and wilfully and wrongfully rang the door bell without lawful occasion, and made a great noise and disturbance, to the annoyance and disturbance of *B.* and against the peace of the Queen, and that *A.* (after request to cease) continued making such noise, &c. without any lawful excuse; and thereupon *B.*, in order to preserve the peace, and render good order and tranquillity in his house, gave *A.* in charge to a policeman.

The plea was held bad, as not shewing that, at the time *A.* was given in charge, he was committing a breach of the peace, or that there was reasonable ground for apprehending that a breach of the peace would be committed by *A.* *Grant* v. *Moser.* 12

9. A declaration in assumpsit by a corporation stated that the defendants had presented a petition to the House of Commons for leave to bring in a bill for drain-

ing certain slob or waste lands in *Ireland*, the introduction of which bill was opposed by the plaintiffs and also by *A.*; and that by a certain agreement made between *B.* on behalf of the plaintiffs of the first part, *C.* on behalf of *A.* of the second part, and the defendants of the third part, it was agreed that the plaintiffs and *A.* should withdraw all opposition to the bill; that the shares therein should be settled by the solicitors of the parties, in order that the bill might be as perfect and beneficial as it could be made; that the plaintiffs and *A.* should use all reasonable means and endeavours to promote the progress of the bill; that part of the slob should be allotted to the plaintiffs, and part to *A.*; that the defendants would, on the passing of the act, pay the plaintiffs 1000*l.*; and that the defendants would pay all costs of obtaining the act; that, by a memorandum indorsed upon the agreement with the consent of all parties, and signed by *D.* as agent to the defendants, it was declared that the plaintiffs and *A.* were severally and jointly bound; that the 1000*l.* was to be paid to the plaintiffs for expenses incurred by them in a survey, and for plans, &c., of which the defendants were to have the benefit; but that the plans, &c. were to be returned to the plaintiffs if the 1000*l.* were not paid. The declaration then stated that in consideration of the agreement and memorandum, and of the premises, and that the plaintiffs would perform all things in the agreement, &c. on their part, the defendants promised to perform all things therein on their part so far as concerned the interests of the plaintiffs; that the plaintiffs delivered the plans, &c.; that they withdrew all opposition to the bill; that *A.* did the same, &c.; whereof the defendants had notice; assigning a breach in the non-payment of the 1000*l.* *The Fishmongers' Company* v. *Robertson.*

Page 131

Upon non assumpsit, held, that it might be inferred that the contract was not under seal.

10. Held, also, that it was not such a contract as would fall within the exceptions to the general rule requiring contracts with corporate bodies to be by deed. *Ibid.* But

11. Held, also, that the contract having been executed on the part of the corporation, and the defendants having received the full consideration, the latter were bound by the contract, and the plaintiffs were entitled to sue thereon. *Ibid.*

12. *Semble*, that if the contract had remained executory, the fact of the corporation having put it in suit would have amounted to an admission on record of their liability under it, so as to estop them from disputing such liability in a cross action. *Ibid.*

13. *Semble*, also, that up to the time of the corporation adopting the contract by performing the con-

dition on their part, there was a want of mutuality, as they could not be competent to perform the contract; and consequently that the defendants during the interval had the power to retract. *The Fishmongers' Company* v. *Robertson.* Page 131

14. Held, that the interest of the plaintiffs and of *A.* being several, the latter was properly omitted to be made a co-plaintiff.

15. Held also, that the agreement declared upon was illegal as being an agreement against public policy.

16. Held, also, that a plea that the bill was not as perfect and beneficial as it might have been made, was no answer to the action. *Ibid.*

17. Held, also, that the issuing by the plaintiffs of all reasonable means and endeavours to procure the bill to pass was not a condition precedent, and therefore that a plea traversing the averment was bad. *Ibid.*

18. Held, also, that a plea stating that the plaintiffs had presented a petition to the House of Lords against the preamble of the bill was bad, as amounting at least to an argumentative traverse of one of the two averments,—that the plaintiffs withdrew their opposition, and that they used all reasonable means to promote the bill. *Ibid.*

19. *Semble*, that a plea directly traversing the averment that the plaintiffs withdrew their opposition was good. *Ibid.*

POTESTATIVE CONDITION.

See 176 (*b*).

PRACTICE.

See AFFIDAVIT.
JOINT STOCK COMPANY.
JUDGMENT AS IN CASE OF A NONSUIT.
NEW TRIAL.

1. A rule making a judge's order a rule of court was dated the 16th of *July*, and entitled "as of *Trinity* term" preceding. Held, to be properly drawn up. *Badman* v. *Pugh.* Page 381

2. By the order the judgment was set aside, with costs to be taxed. They were taxed at 6*l.* 5*s.*, and not paid. The rule of court recited the order verbatim, and ordered the payment of the costs of making the order a rule of court, which were afterwards taxed. A *fi. fa.* was sued out, directing the sheriff to levy 9*l.* 6*s.* 8*d.* as the sum which had been ordered to be paid to the rule of court, together with interest at 4 per cent. (pursuing the form No. 8. appended to *R. H.* 2 *Vict.*): Held, that the *fi. fa.* and the levy thereunder were irregular, the form (No. 8.) being applicable only to cases where the payment of a specific sum of money is ordered. *Ibid.*

3. The three days following *Christmas* day, though made holidays at the offices by 3 & 4 *W.* 4. *c.* 42. *s.* 43., are reckoned in legal proceedings. *Wilks* v. *Perks.* 376

4. The plaintiff applied to sign judgment on the 3d of *January* (when the time for pleading expired); but upon the officer suggesting that there was a doubt whether those three days were to be reckoned in the time for pleading, he forbore to sign judgment. On the same day the defendant died. The court refused to allow the plaintiff to sign judgment *nunc pro tunc*. *Wilks* v. *Perks*. Page 376

5. Where the notice of an application to postpone a trial omitted to offer to pay the costs of the postponement, the court, on making the rule absolute, gave the plaintiff as well the costs of the postponement of the trial as also the costs of the motion, notwithstanding cause was shewn in the first instance. *Ward* v. *Ducker*. 377

6. In *January* 1836 the defendant was charged in execution for 61*l*. 14*s*. On the 1st of *October* 1838 the 1 & 2 *Vict*. *c*. 110. came into operation. The plaintiff having afterwards died, and his widow having taken out administration, *A*., who had acted as attorney for the plaintiff, commenced proceedings in the insolvent court to obtain a vesting order upon the defendant's estate, under sect. 36. The defendant sent *B*. (an attorney) to *A*. to endeavour to effect a compromise. *A*. claimed 85*l*. 5*s*. 2*d*., including a demand for interest at 4 per cent. upon the judgment from the time it was entered up, under sect. 17. It was ultimately agreed between *A*. and *B*. that the defendant should be discharged upon payment of 80*l*., which agreement was carried into effect. The court refused to compel *A*. to refund the sum of 18*l*. 6*d*., the excess beyond the sum for which the defendant was taken in execution, it having been paid under a compromise. *Haigh* v. *Jones*. Page 634

7. *Quære*, if the defendant was strictly liable to pay any interest on the judgment. *Ibid*.

8. *Semble* (per *Coltman* J.), that if the administratrix had revived the judgment by *sci. fa*., she would have been entitled to interest from the commencement of the act. *Ibid*.

9. The rule called upon *A*., "as the attorney for the said plaintiff," to refund the money: Held, sufficient, notwithstanding the plaintiff had died before *A*. received the money. *Ibid*.

10. Power of court to turn special case into special verdict, without consent of both parties. *Collins* v. *Gwynne*. 671 *n*.

11. The court allowed a distringas to compel appearance to issue, although the writ of summons was indorsed for "50*l*. for debt and interest thereon," without stating any time from which the interest was to be computed. *Fitzgerald* v. *Evans*. 207

12. The defendant was served with a copy of a writ of summons to appear in the Queen's Bench, tested

by the Lord Chief Justice of the Common Pleas. At the time of the service, and also when served with notice of declaration in the Common Pleas, the defendant said that he would see the plaintiff and arrange about paying the debt.

Held, that he thereby waived the irregularity. *Holt* v. *Eades.* Page 689

13. Where a cause was entered as a special jury cause, but was taken in the defendant's absence and tried by a common jury, as an undefended cause, the court set aside the trial and verdict with costs. *Hayne* v. *Hall.* 693

14. Writ of summons in debt, and notice of declaration in assumpsit: Held, that the irregularity was not waived by taking the declaration out of the office. *Driver* v. *Pemeller.* 694

15. A writ of summons in assumpsit was indorsed with a claim for "19*l.* 4*s.* 7*d.*, with interest thereon at 5 per cent. till paid." The damages in the declaration were laid at 50*l.* After various pleadings the plaintiff signed judgment by default for 21*l.* 8*s.* 8*d.* Issues in fact were joined upon some of the pleadings, and an issue in law upon part, as to which last the plaintiffs recovered judgment. A writ of trial was issued directing the sheriff as well to try the issues joined, as to assess damages in respect of the judgment by *nil dicit*, and the judgment on the demurrer. The plaintiffs obtained a verdict for 23*l.* 15*s.* 1*d.*, and having entered a *remittitur* for 3*l.* 15*s.* 1*d.*, signed judgment for 20*l.* and costs.

Held, upon an application to set aside the execution of the writ of trial, and all subsequent proceedings for irregularity, that the writ of trial and execution thereof were regular; as it did not appear that the sum sought to be recovered by the plaintiffs exceeded 20*l.* *Fryer* v. *Smith.* Page 605

16. Held, also, that it was no objection to such writ that the sheriff was directed to assess the damages as well as to try the issues. *Ibid.*

17. Held, also, that the entry of the remittitur cured any irregularity in the verdict. *Ibid.*

18. *Semble*, that the indorsement on the writ of summons was irregular, and might have been taken advantage of in the first instance. *Ibid.*

19. Where the defendant delivers a plea duly signed by counsel, and afterwards, under a judge's order, delivers additional pleas without such signature, *quære*, whether the plaintiff can treat such additional pleas as nullities. *Badman* v. *Pugh.* But 381

20. Held, that the plaintiff was not entitled to sign judgment upon the whole declaration as for want of a plea; inasmuch as, even assuming the additional pleas to be nullities, they did not avoid the first plea, which was well pleaded. *Ibid.*

21. Where an old warrant of at-

torney had been given to secure a debt and interest, the sum for which judgment was to be confessed being for the amount of the debt only, the court granted a rule to enter up judgment for the debt, and so much for interest as the master should find to be due thereon. *Chalk* v. *Walton.* Page 573

22. The 33d rule of *H.* 2. *W.* 4., which requires applications to set aside proceedings for irregularity to be made in a reasonable time, was held to apply to prisoners as well as to other persons. *Claridge* v. *Mackenzie.* 251

23. By a railway act, it is enacted, that if any person interested in lands affected by the execution of the act shall not agree with the company as to the amount of purchase money or compensation &c., and shall request that the matter in dispute may be submitted to the determination of a jury, the company shall issue a warrant to the sheriff or sheriffs of the county or city where the lands in question shall be situate, &c., and if such sheriff or sheriffs shall be a shareholder or shareholders in the company, then to any of the coroners of, &c., to impanel a jury, who are to inquire and assess, &c.

Quære, whether this enactment would apply in a case where, as in *Middlesex*, the office of sheriff is constituted of two persons, and where one only of such persons is a shareholder in the company. *Corrigal* v. *London and Blackwall Railway Company.* Page 219

24. By a subsequent act extending the line of railway, it is enacted, that in cases of dispute between the company and parties claiming compensation, wherein the company do not upon request, &c., within twenty-one days, issue their warrant to the sheriff or sheriffs of the county or city where, &c., it shall be lawful for the party so having given notice, himself to send a request in writing to the sheriff, &c., according to the tenor of the former act, and the sheriff, &c. shall thereupon impanel a jury, &c.

Held, that the former enactment did not apply in a case where a party proceeded under the latter act, so as to render void the proceedings held before the sheriff; the former enactment being confined to cases where the company themselves issued their warrant, which they were not to direct to one of their own shareholders, and the latter embracing cases in which the company having neglected to issue the warrant, the party in dispute with them might call upon the sheriff to take an inquisition, as such party would have no means of knowing whether or not the sheriff was a shareholder. *Ibid.*

25. *Quære*, whether such proceedings would have been avoidable if objected to at the proper time. *Ibid.*

26. But held, that where the com-

pany appeared by counsel before the sheriff and jury at the taking of the inquisition, without objection, they had waived any such objection. *Corrigal* v. *London and Blackwall Railway Company.*

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27. By the first act, it is further enacted, that the jury shall inquire, &c., and give a verdict for the sum to be paid for the purchase of lands, and also the sum to be paid by way of satisfaction, &c. for goodwill, &c., and that such satisfaction shall be inquired into, and assessed separately and distinctly from the value of the lands.

By the second act, it is further enacted, that in case any dwelling-house, &c. within fifty feet from the railway, shall be deteriorated in value, and the owner, &c. shall require the company to purchase the same, the company shall treat for the purchase and for the compensation, &c., for any loss, &c., in respect of any tenant's fixtures, &c.; and in case the parties cannot agree as to the value of such dwelling-house, &c., or as to the amount of such compensation, &c., then the amount shall be ascertained by the verdict of a jury in the manner described in the former act, &c.; provided that no party shall be entitled to receive compensation unless the jury shall, by their verdict, determine that the property has been deteriorated in value by the construction of the railway.

The plaintiff in an action upon a judgment founded upon an inquisition to recover, under the last-mentioned section, the purchase money of a house, and compensation for tenant's fixtures, &c. stated that the jury gave a verdict for 250*l.* "for the purchase of a house, and also by way of satisfaction, &c. for all damage in respect of the tenant's fixtures." The defendant pleaded that the plaintiff adduced evidence at the inquisition, "not only of the loss and damage in respect of the dwelling-house by reason of the construction of the railway, but that the jurors did assess and give a verdict for the sum of 250*l.* for the purchase of the dwelling-house, and also by way of satisfaction, &c. for the several losses, &c. in the plea mentioned;" whereby the inquisition, verdict and judgment are void.

Held, that the mere fact of the plaintiff's adducing such evidence, and the receiving thereof by the sheriff, did not affect the validity of the verdict, as such evidence may have been given to shew that the house had been deteriorated; which was necessary to give jurisdiction to the sheriff and jury. *Corrigal* v. *London and Blackwall Railway Company.*

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28. Held, also, that the verdict as stated in the declaration, excluded the possibility of any damages being given for the deterioration of the house by the construction of the railway. *Ibid.*

29. Held, also, that the enactment in the first act, as to separate assessments, was *directory* only, and not in the nature of a *condition*. *Corrigal* v. *London and Blackwall Railway Company*. Page 219

30. By the first act, it was provided, that if the jury gave the same or a greater sum than the company had previously offered, the company should pay all the costs of the inquisition; if less than had been previously offered, that each party should pay half the costs; and that if by reason of absence abroad or any other disability, any person should have been prevented from treating with the company, they the company should pay the whole costs.

The second act was silent as to costs.

Held, that a party proceeding under the second act, in a case not falling within the classes mentioned in the first, was not entitled to costs. *Ibid.*

31. The plaintiff's counsel at the trial interrupted the summing up, conceiving that there was a misdirection in law, and elected to be nonsuited. The court allowed him to set aside the nonsuit.

Quære (per *Cresswell* J.), whether a plaintiff is strictly entitled so to do. *Wilkinson* v. *Whalley*. 590

32. When the plaintiff was nonsuited upon the opening speech of his counsel, and it afterwards was shewn by affidavit that his witness could have proved a good cause of action not stated in the opening speech, the court granted a new trial upon payment of costs. *Edger* v. *Knapp*. Page 753

33. *Semble*, that where service of the writ of summons is upon the defendant's wife, the plaintiff should not enter an appearance, but should move for a distringas. *Todd* v. *Crosby*. 590

34. The rule as to not granting a new trial on payment of costs where the trial is by writ of trial, and the verdict is under *5l.*, applies to a case in which the amount claimed by the plaintiff by his particulars exceeds *5l.*, but is reduced by payment into court below that sum, although the verdict be for the defendant. *Watts* v. *Judd*. 598

35. In debt for rent on a demise for years, with a count for fixtures sold, the plaintiff claimed by his particulars *5l. 5s.* for rent and *12l.* for fixtures. The defendant paid *11l. 5s.* into court. Held, no admission of the defendant's liability in respect of fixtures to a greater amount than had been paid into court. *Goff* v. *Harris*. 573

36. Where upon enlarging a rule it is made a term that any further affidavits shall be filed before a certain day, a party is not precluded from using an affidavit which had been sworn before the day fixed, but which was re-sworn after that day, for the purpose of rectifying a mistake in the jurat. *Auchterlony* v. *Gibson*. 579

37. A capias cannot issue upon a

scire facias on judgment under 1 & 2 *Vict. c.* 110. *s.* 35. *Agassiz* v. *Palmer.* Page 697

38. The court refused to grant a rule nisi for a new trial upon an affidavit statingthat one of the jury declared in open court in the presence and hearing of the others, that the verdict had been decided by lot. *Burgess* v. *Langley.* 722

39. The court will not grant a new trial upon the ground of surprise, merely because the unsuccessful party has neglected properly to instruct his attorney. *Tharpe* v. *Stallwood.* 760

PRISONER.

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In a *qui tam* action for penalties, the court refused to stay the proceedings, or to give the defendant further time to plead, upon a suggestion, by affidavit, that an act of parliament was likely to be passed, the effect of which would be to relieve the defendant from the penalties. *Grant* v. *Ridley.* Page 201

RAILWAY ACT.

1. By a railway act, it is enacted, that if any person interested in lands affected by the execution of the act shall not agree with the company as to the amount of purchase-money or compensation, &c., and shall request that the matter in dispute may be submitted to the determination of a jury, the company shall issue a warrant to the sheriff or sheriffs of the county or city where the lands in question shall be situate &c., and if such sheriff or sheriffs shall be a shareholder or shareholders in the company, then to any of the coroners, &c., to impanel a jury, who are to enquire, &c., and assess, &c.

Quære, whether this enactment would apply in a case where, as in *Middlesex*, the office of sheriff is constituted of two persons, and where one only of such persons is a shareholder in the company.

Corrigal v. *London and Blackwall Railway Company.* Page 219

2. By a subsequent act extending the line of railway, it is enacted that in cases of dispute between the company and parties claiming compensation, wherein the company do not, upon request, &c., within twenty-one days, issue their warrant to the sheriff or sheriffs of the county or city where, &c., it shall be lawful for the party, so having given notice, himself to send a request in writing to the sheriff, &c., according to the tenor of the former act, and the sheriff, &c. shall thereupon impanel a jury, &c.

Held, that the former enactment did not apply in a case where a party proceeded under the latter act, so as to render void the proceedings held before the sheriff, the former enactment being confined to cases where the company themselves issued their warrant, which they were not to direct to one of their own shareholders, and the latter embracing cases in which the company, having neglected to issue warrants, the party in dispute with them might call upon the sheriff to take an inquisition, as such party would have no means of knowing whether or not the sheriff was a shareholder. *Ibid.*

3. *Quære*, whether such proceedings would have been voidable if objected to at the proper time. *Ibid.*

4. But held, that where the company appeared by counsel before the sheriff and jury at the taking of the inquisition without objection, they had waived any such objection. *Corrigal* v. *London and Blackwall Railway.* Page 219

5. By the first act it is further enacted that the jury shall inquire &c., and give a verdict for the sum to be paid for the purchase of lands, and also the sum to be paid by way of satisfaction, &c., for good-will, &c., and that such satisfaction shall be inquired into and assessed, separately and distinctly from the value of the lands.

By the second act it is further enacted, that in case any dwelling-house, &c., within fifty feet from the railway, shall be deteriorated in value, and the owner, &c. shall require the company to purchase the same, the company shall treat for the purchase and for the compensation, &c., for any loss, &c., in respect of any tenant's fixtures, &c.; and in case the parties cannot agree as to the value of such dwelling-house, &c., or as to the amount of such compensation &c., then the amount shall be ascertained by the verdict of a jury in the manner described in the former act, &c., provided that no party shall be entitled to receive compensation, unless the jury shall, by their verdict, determine that the property has been deteriorated in value by the construction of the railway.

The plaintiff in an action upon

a judgment founded upon an inquisition to recover under the last-mentioned section, the purchase-money of a house, and compensation for tenant's fixtures, &c., stated that the jury gave a verdict for 250*l.* "for the purchase of a house, and also by way of satisfaction, &c. for all damage in respect of the tenant's fixtures." The defendant pleaded that the plaintiff adduced evidence at the inquisition "not only of the loss and damage in respect of the dwelling-house by reason of the construction of the railway, but that the jurors did assess, and give a verdict for, the sum of 250*l.* for the purchase of the dwelling-house, and also by way of satisfaction, &c. for the several losses, &c., in the plea mentioned," whereby the inquisition, &c. are void.

Held, that the adducing and receiving such evidence did not affect the validity of the verdict, as it may have been necessary to shew that the house had been deteriorated, to give jurisdiction to the sheriff and jury. *Corrigal* v. *London and Blackwall Railway Company.* Page 219

6. Held, also, that the verdict as stated in the declaration excluded the possibility of any damages being given for the deterioration of the house by the construction of the railway. *Ibid.*

7. Held, also, that the enactment as to separate assessments, was *directory* only, not a *condition.* *Ibid.*

8. By the first act it was provided, that if the jury gave the same or a greater sum than previously offered, the company should pay all the costs of the inquisition; if less, that each party should pay half the costs; and that if by reason of absence any person should have been prevented from treating, the company should pay the whole of the costs. The second act was silent as to costs.

Held, that a party proceeding under the second act, in a case not falling within the classes mentioned in the first, was not entitled to costs. *Corrigal* v. *London and Blackwall Railway.* Page 219

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2 *Vict. c.* 110. *s.* 35. *Agassiz* v. *Palmer.* Page 697

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SHIP.

A charter-party (or memorandum of charter), by which it is agreed that the ship after delivering her outward cargo at *Malta*, shall, with all convenient speed, sail to one of several ports, as shall be ordered at *Malta*, contains an implied promise, on the part of the charterer, that the ship shall be ordered at *Malta* to sail to such port within a reasonable time after her arrival at *Malta*. *Woolley* v. *Reddelien.* 316

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STAMP.

See EVIDENCE.

1. A memorandum, by which, in consideration that *A.* will withdraw a distress which he had put in for an arrear of rent exceeding 20*l.*, which *B.* admits to be due from him as tenant to *A.*, until a future day, *B.* declares, that in case of default, it shall be lawful for *A.* to enter and distrain, and to pursue all remedies for the recovery of the rent, as if no distress had been taken, is admissible in evidence to prove the tenancy without an agreement stamp. *Hill* v. *Ramm.* Page 789
2. A memorandum as follows: "Send me a licence to use two of *A.*'s patent furnaces to be applied to a single plate, &c., for which I agree to pay, as agreed, 25*l.* as a patent right, and which is to include iron works, fire-bricks, and labour; engineer or furnace builder's time to superintend or fix the above order, to be paid 6*s.* per day."

   Held, to be either an agreement or an acceptance of a previous proposal, and therefore to require a stamp. *Chanter* v. *Dickinson.* 253
3. Held, also, that it was within the exemption in the stamp act as relating to "the sale of goods, wares, or merchandize," as either the primary object of the agreement was the licence, or it was an agreement for the erection of fixtures. *Ibid.*
4. A memorandum, by which, in consideration that *A.* will withdraw a distress which he had put in for an arrear of rent exceeding 20*l.*, which *B.* admits to be due

from him as tenant to *A.*, until a future day, *B.* declares, that in case of default it shall be lawful for *A.* to enter and distrain, and to pursue all remedies for the recovery of the rent, as if no distress had been taken, is admissible in evidence to prove the tenancy without an agreement stamp. *Hill, Clerk,* v. *Ramm.* Page 789

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1. The court refused to discharge a judge's order (made under the 1 & 2 *Vict. c.* 110. *s.* 14.) to charge stock standing in the names of trustees for the defendant. *Rogers* v. *Holloway.* 292
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1. An administrator may maintain trespass for acts done after the death of the intestate, and before the grant of administration. *Tharpe* v. *Stallwood.* 760
2. The rule that a party cannot be made a trespasser by relation, is only applicable where the act complained of was lawful at the time. *Ibid.*
3. Trespass for toll taken by servant of corporation. 182 (*d*)
4. To a declaration for false imprisonment, the defendant pleaded that the plaintiff, with force and arms, came to the door of the defendant's house, and with great force and violence attempted to enter against the will of the defendant, and wilfully and wrongfully rang the door bell, without lawful occasion, and made a great noise and disturbance, to the annoyance and disturbance of the defendant, and against the peace of the Queen, and (after request to cease) continued making such

noise, &c., without any lawful excuse; and thereupon the defendant, in order to preserve the peace and restore good order and tranquillity in his house, gave the plaintiff in charge to a policeman.

The plea was held bad, as not shewing that, at the time the plaintiff was given in charge, he was committing a breach of the peace, or that there was reasonable ground for apprehending that a breach of the peace would be committed. *Grant* v. *Moser.* Page 123

5. In trespass by *A. B.*, the defendant, under a *ca. sa.*, alleged to have been issued against "the now plaintiff," without otherwise describing him. The justification is established by the production of a *ca. sa.* against *C. B.*, and proof that in the former action the now plaintiff was the party sued by the name of *C. B.* *Fisher* v. *Magnay.* 778

6. *Semble*, that the plea would have been more formal if it had alleged that the *ca. sa.* was against *C. B.*, and that *C. B.*, the party against whom the *ca. sa.* issued, and *A. B.*, the now plaintiff, were one and the same person. *Ibid.*

7. And although it had been alleged that the *ca. sa.* was against *C. B.*, the averment of identity would have been sufficient without averring that the plaintiff was known as well by one name as by the other. *Ibid.*

8. Where an execution has been set aside. Page 391 (*b*)

TROVER.

A., to whom *B.* was indebted, received a bill from *B.* "to get discounted, or return on demand." *A.* sent the bill to *C.*, with directions to place it to *A.*'s account with *C.*; which *C.* did, minus the discount.

Held, in trover for the bill by *B.* against *A.*, that this was substantially a discounting of the bill by *A.* and that *A.* was entitled to a verdict under a plea of not possessed. *Wilkinson* v. *Whalley.* 590

2. *Semble* (per *Coltman* and *Cresswell* JJ.), that *A.* was also entitled to the verdict under not guilty. *Ibid.*

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See JURY.

The court refused to grant a rule nisi for a new trial, upon an affidavit stating that one of the jury declared in open court in the presence and hearing of the others, that the verdict had been decided by lot. *Burgess* v. *Langley.* 722

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The rule as to not granting a new trial on payment of costs where the trial is by writ of trial, and the verdict is under *5l.*, applies to a case in which the amount claimed by the plaintiff by his particulars exceeds *5l.*, but is reduced by payment into court below that sum, although the verdict be for the defendant. *Watts* v. *Judd.*

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REGISTRATION CASES.

CASES DECIDED UPON THE CONSTRUCTION OF THE REFORM ACT, 2 *W.* 4. *c.* 45.

I. Case upon sect. 20.

1. A lessee of several houses (all locally situate within a borough) for the residue of a term of not less than sixty years, one such house being of sufficient value to confer a vote for the borough under 2 *W.* 4. *c.* 45. *s.* 27., if the remaining houses are each of less than that value, but collectively of more, is not deprived by sect. 25. of his right to vote for the county under sect. 20. in respect of such remaining house. *Webb*, App.; *Aston*, Resp. Page 14

II. Case upon sect. 25.

Webb, App.; *Aston*, Resp., *ut suprà*.

III. Cases upon sect. 27.

Webb, App.; *Aston*, Resp., *ut suprà*.

1. Rooms in a factory were let to cotton-spinners, separately, the rents varying according to the size of the room. The approach to the room was either by a common staircase leading from the entrance to the factory (to which there was a door which was never fastened), or by separate outside staircases, or by doors opening into the yard. Each tenement had its own spinning-machine (which was worked by a steam-engine belonging to the landlord, it being part of each contract that the landlord should supply steam power), and also the exclusive use of his room, and the key to the door thereof.

Held, that the occupier of each room was the exclusive occupier of "a building" within the section. *Wright* v. *The Town Clerk of Stockport.* Page 33

2. The names of the landlord and all the occupiers were inserted in the rate-book under the column headed "occupier." The whole building

was assessed under the head "gross estimated rental" at 12*l.* The amount of "rate" and the "total amount to be collected" were stated to be 25*l.* The "amount actually collected" was stated to be 23*l.* 2*s.* 6*d.*, and in the last column, headed "empty," the sum inserted was 1*l.* 17*s.* 6*d.*

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3. It was part of the agreement with each tenant, that the landlord should pay the rates, and the rent was higher in consideration of such payment. The whole of the rate, with the exception of what had been allowed for the "empty" portions, had been paid by the landlord.

Held, that such payment ensured as a payment by each tenant of the poor-rate assessed on him. (*a*) *Ibid.*

1. *A.*, the master rope-maker in a dock-yard, had, as such, a house in the dock-yard for his residence, of which he had all the exclusive use, without paying rent, as part remuneration for his services, no part of it being used for public purposes. The house was stated in the case to belong to the lords of the Admiralty (*quære*, if not to the Queen). If *A.* had not had it, he would have had an allowance for a house in addition to his salary. Held, that *A.* occupied the house as tenant within this section. *Hughes*, App.; v. *Overseers of Chatham*, Resp. Page 54

2. *A.* was rated to the poor-rate as occupier. The rates were paid by the paymaster-general, also in part remuneration of *A.*'s services. If he had paid the rates, the Admiralty would have repaid him.

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Held, that *A.* did not occupy the house "as tenant," inasmuch as he was required to occupy the same, with a view to the more efficient performance of his duties as

(*a*) *Vide tamen*, p. 52. (*b*)

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Bartlett, App.; *Gibbs*, Resp., *ut suprà.*

III. Case upon sect. 62.

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2. The statement in writing by the revising barrister is duly transmitted to the master, but the notice of intention to prosecute the appeal is not sent in time. Held, that the appeal cannot be entered. *Ibid.*

3. An affidavit by the clerk of the attorney to the appellant, stating that the notice which is required to be signed by the appellant, had by mistake not been sent, cannot be received as a substitute for such notice. *Ibid.*

4. The statement in writing by the revising barrister is duly transmitted to the master, but the notice of intention to prosecute the appeal is not sent in time. Held, that the appeal cannot be entered. *Simpson*, App.; *Wilkinson*, Resp. 3 *n.*

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ERRATA.

VOL. II.

Page 746 (*a*) line 2., for "pl. 34." read "pl. 33."

VOL. III.

Page 468. marginal note, line 4., for "drafts" read "draft:" and line 15., for "and *A.* drawing a new bill. The new bill is drawn by *A.*" read "and drawing a new bill upon *A.* The new bill is accepted by *A.*"

818. in the pedigree, *Mary Ann Parker* should be placed under *George Parker*, whose daughter she was.

VOL. IV.

Page 329., for "1 *Q. B.* 117." read "2 *Q. B.* 117."

451. line 12., for "and to have a new trial" read "and enter a verdict for the sum claimed."

Same page, line 13., for "for a new trial" read "accordingly."

Same page, line 21., insert a bracket after (*c*), and strike out the bracket in line 23.

VOL. V.

Page 123. in marginal note, for "render" read "restore."

188. note, line 12., for "293." read "fo. 2."

313. line 12., for "declaration" read "plea."

322. line 2., and page 326. line 23., for "*Sidwell*" read "*Lidwell.*"

480. line 11., for "*Fellows*" read "*Taylor.*"

551. line 20., for "commencement of the suit breach:" read "commencement of the suit. Breach."

612. line 2., for "But would" read "But it would."

619. line 3., for "trade?" read "trade?]"

628. line 12., for "1841" read "1811."

699. line 8., for "profits" read "process."